(1)
Supreme Court, U.S.
FILED
97-49 JUL 2 1997
No. OFFICE OF THE CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1997

PORTLAND GENERAL ELECTRIC COMPANY,

Petitioner,

v.

COLUMBIA STEEL CASTING CO., INC.

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR WRIT OF CERTIORARI

Barbee B. Lyon
Counsel of Record
James C. Loy
David S. Aman
TONKON, TORP, GALEN,
MARMADUKE & BOOTH
1600 Pioneer Tower
888 SW Fifth Avenue
Portland, OR 97204-2099
(503) 221-1440
Attorneys for Petitioner

Filed July 2, 1997

36 pp

QUESTIONS PRESENTED

1. Does the state action doctrine permit a federal court to review the orders and actions of a state regulatory agency to determine whether they conform substantively and procedurally to state law?

2. In applying the state action doctrine to determine whether conduct of state-regulated utilities is immune from federal antitrust liability, must a federal court accept the clearly expressed view of the state regulatory agency and reviewing state courts as to the substance of the state policy?

3. Where a final state court judgment between the parties establishes that a state regulatory decision compelled a party's conduct pursuant to state law, may a federal court impose treble damages for that conduct?

4. Must the decisions and conduct of a state regulatory agency subsequent to an initial, arguably ambiguous order of that agency be considered in determining whether there is a clearly articulated policy?

5. If a regulated utility relies on the appearance of legality when a state regulatory agency's exercise of power is unauthorized, does it nevertheless have immunity under the state action doctrine?

PARTIES TO THE PROCEEDING

In addition to the parties named in the case caption, the Public Utility Commission of the State of Oregon was a party to the proceedings in the Court of Appeals.

Petitioner Portland General Electric Company is a corporation. Its parent company, as of the time this petition is prepared, is Portland General Corporation. However, Portland General Corporation is on the eve of a major corporate transition, and petitioner will supplement this disclosure when the new information becomes available.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	15
I. The decision below conflicts with this Court's decisions on the state-action doctrine.	16
II. The decision below conflicts with decisions of the Eleventh Circuit and the Tenth Circuit	23
A. The Eleventh Circuit decision in *Praxair*.	23
B. The Tenth Circuit decision in *Lease Lights*.	25
III. The decision below is in conflict with a final judgment of an Oregon court, to which the Court of Appeals refused to give full faith and credit.	26
IV. The questions presented are important.	29
V. PGE should at least have a jury trial.	30
CONCLUSION	30

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242, 255 (1966) 3

California Retail Liquor Dealers Assn.
v. Midcal Aluminum, Inc.
445 U.S. 97 (1980) 13, 16, 17, 21, 22

City of Columbia v. Omni Outdoor Advertising,
499 U.S. 365, 370-72 (1991) 20, 21

F.T.C. v. Ticor Title Insurance Co.,
504 U.S. 621 (1992) 16, 18, 21

Lafayette v. Louisiana Power & Light Co.
435 U.S. 389 (1978) 20

Lease Lights, Inc. v. Public Service Co. of Okla.,
849 F.2d 1330 (10th Cir. 1988), cert. denied,
488 U.S. 1019 (1989) 18, 25

Parker v. Brown, 317 U.S. 341 (1943) 21

Patrick v. Burget, 486 U.S. 98 (1988) 16

Praxair, Inc. v. Florida Power & Light Co.,
64 F.3d 609 (11th Cir. 1995), cert. denied,
__ U.S. __, 116 S.Ct. 1678, 134 L.Ed.2d 781
(May 13, 1996) 23, 24

Southern Motor Carriers Rate Conference v. U.S.,
471 U.S. 48 (1985) 16, 17, 21

Town of Hallie v. City of Eau Claire,
471 U.S. 34 (1985) 12

STATUTES

15 U.S.C. § 1 2

15 U.S.C. § 2 . . . . . 7, 10

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1331 7

28 U.S.C. § 1738 . . . . . 2, 29

Or. Rev. Stat. § 758.405 3

Or. Rev. Stat. § 758.410 3

Or. Rev. Stat. § 758.415 . . . . . 3, 28

Or. Rev. Stat. § 758.450(2) 3

OTHER

P. Areeda & H. Hovenkamp, Antitrust Law ¶ 212.3b, p. 145 (Supp. 1989) 20, 25

P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 212.4b, at 132 (Supp. 1987) 25

Portland General Electric Company (PGE) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The first opinion of the Court of Appeals is reported at 60 F.3d 1446. (App. C.) A second opinion vacated the first, and is reported at 103 F.3d 1446. (App. B.) The third and final opinion modified the second, and is reported at 111 F.3d 1427. (App. A.)

The first opinion of the district court granting partial summary judgment is reported at 770 F.Supp. 562. (App. E.) Later opinions granting final summary judgment were not reported.

The 1992 opinion of the Oregon Public Utility Commission, confirming that it had made a territorial allocation of Portland in 1972, is reported at 133 P.U.R. 4th 145. (App. M.) It was affirmed by a Circuit Court of the State of Oregon in an unreported opinion (App. O), and subsequently affirmed without opinion by the Oregon Court of Appeals at 125 Or. App. 338, 865 P.2d 1342 (App. P), review denied, 318 Or. 478, 871 P.2d 123. (App. Q.)

JURISDICTION

The Court of Appeals entered an amended judgment on December 27, 1996. Upon a timely petition for rehearing, the Court of Appeals denied the petition on April 3, 1997. (App. A 1-3.)

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Full faith and credit

"The records and judicial proceedings of any court of any ... State ... shall have the same full faith and credit in every court within the United States ... as they have by law or usage in the courts of such State ..." 28 U.S.C. § 1738.

Sherman Act § 1

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal ..." 15 U.S.C. § 1.

Oregon state statutes

The Oregon statutes are in App. R.

STATEMENT OF THE CASE

PGE agrees with the Court of Appeals that the facts are undisputed. The Court should also bear in mind that this case was decided by summary judgment against PGE. PGE's evidence must therefore be believed, and all justifiable inferences drawn in favor of PGE. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1966).

Oregon adopts a policy to eliminate competition between utilities.

Portland is served by two electric utilities, PGE and Pacific Power & Light (PP&L). In the past, PGE and PP&L competed for the same customers. Two power lines, one from each utility, ran down many city streets. (App. J 3-4.)

The Oregon Legislature disapproved of such competition, considering it wasteful to maintain two duplicate electric systems to serve a single area. Two systems cost more than one, and the consumers paid the extra costs in their rates. (App. J 3-4.) There was also a safety hazard in having live wires from different utilities adjacent to each other on city streets. (App. M 5.)

The Oregon Legislature therefore declared a state policy to eliminate such duplication, and to prevent it in the future. Or. Rev. Stat. § 758.405, (App. R 3.) Most other states have similar statutes to ensure that only one utility serves a territory or a customer. (CR[1] 267, Ex. 45 at 34-36; CR 292, Ex. 89 at 9.)

The Oregon statute allows competing utilities to allocate territories and customers between themselves by contract. Or. Rev. Stat. § 758.410, (App. R 3-4.) The contract should designate "which territories and customers are to be served by which of said contracting parties." *Id.* Such a contract has to be submitted to the Oregon Public Utility Commission (OPUC) for a hearing. Or. Rev. Stat. § 758.415, (App. R 4.) If OPUC finds that the contract satisfies four statutory criteria, competition is thereafter forbidden by law. *Id.*; Or. Rev. Stat. § 758.450(2), (App. R 7.) Although the utility would thereby acquire a legal monopoly, it could not charge monopoly rates because its rates are controlled by OPUC. (CR 266, Ex. 45, pp. 19-26; CR 266, Ex. 46, pp. 17-18.)

PGE and PP&L contract to allocate Portland between them.

PGE and PP&L entered into a contract in 1972 to divide Portland between them (the 1972 Agreement). This 1972 Agreement established the metes and bounds of different "service areas" for PGE and PP&L in Portland. (App. S 12.)

---

[1] CR refers to the Clerk's Record in the district court.

Parcel C, where plaintiff Columbia Steel is located, was to become PGE's service area. (App. S 2; map at App. M 35.) In Parcel C, PGE was to acquire PP&L's substations, poles, lines, and other property.[2] *Id.* PGE was also to acquire all of PP&L's customer accounts in Parcel C (not including Columbia Steel, however, because it already happened to be a PGE customer.) (App. S 7-8.) All in all, 28,000 customers were to be transferred from PP&L to PGE, and 38,000 from PGE to PP&L. (App. J 3.) Overall, the contract effected a massive exchange of property and customers, separated the respective systems of the two utilities into non-overlapping areas, and eliminated the competition between them.

The City of Portland had objected in the past to allocating territories in Portland. (ER[3] 149, ¶13.) This derived partly from a provision in the Portland City Charter against "exclusive" utility franchises. A City official objected to the word "exclusive" in the 1972 Agreement, and that word was omitted. (CR 265, EX 12, p. 6.) The statute, on the other hand, did not require the use of the word "exclusive". (App. R 3-5.) The City adopted an ordinance that approved the 1972 Agreement and also referred to the Charter provision.

OPUC approves the 1972 Agreement.

OPUC held a hearing, and issued an Order (1972 Order) approving the 1972 Agreement in all respects, except for one that bears on the dispute in this case. (App. J 8.) PGE and PP&L proposed to retain their respective employees as customers, even if they lived in the service area being transferred to the other utility, so that they could keep their employee discounts. This could be done by "wheeling" power

---

[2] The parcels bore different labels in OPUC's subsequent order approving the contract. (App. J 12-13.)

[3] ER Refers to the Excerpts of Record in the Court of Appeals.

to them over the lines of the other utility, since the two systems were interconnected.

OPUC rejected this proposal in the following words in the 1972 Order:

> "This method results in discrimination in that the company serving the area should serve all persons living in that area and, just because the customer is an employee of the utility, this should not permit him the right to choose which utility service he will take. ... [T]hese employees, like any other customers in the area, must become the customers of the new utility serving the area." (App. J 8.)

This prohibition against customer choice did not originate with PGE or PP&L. It was OPUC itself that imposed, as a matter of state policy, a prohibition against allowing customers to choose a utility other than the one serving the area.

> *OPUC insists that it allocated Portland between PGE and PP&L.*

After OPUC had issued the 1972 Order, OPUC consistently declared that it had thereby allocated territory and customers in Portland, and had eliminated competition. (App. M 21-23.) In an Order issued the following year, OPUC declared that PGE had a "state-approved service area allocation" within an area "including ... Portland." (App. K.) The year after that, OPUC set PP&L's rates in Portland higher than PGE's, saying

> "The two companies no longer competitively serve the same areas. Their respective areas of service within Portland have been defined. Thus, with the lack of competition, the justification for rate uniformity is said to have disappeared." (App. L 2.)

The Portland City Attorney testified that he intervened in OPUC proceedings to assert the City's position, and to oppose OPUC's assertion that its 1972 Order had effected an allocation of territories in Portland. (CR 265, Ex. 14, ¶ 2, 6.) After the City's position was rebuffed, the City acquiesced and considered the issue of territorial allocations to be closed. *Id.*

For nearly 20 years, OPUC's policy went unchallenged. OPUC witnesses testified that if PGE and PP&L had tried to compete in Portland, OPUC would have tried to stop them. (CR 275 ¶ 5.) They testified that they consistently treated PGE as if it had been granted an exclusive Portland service territory pursuant to the 1972 Order. *Id.*

In the late 1980's, however, Columbia Steel did challenge OPUC's policy. PGE's industrial rates to customers like Columbia Steel had become higher than PP&L's, and Columbia Steel demanded to switch to PP&L. (App. F 8.) Although Columbia Steel was in PGE's service area, its plant happened to lie beneath a PP&L transmission line that crossed PGE's service area. Even so, it was not technically possible for PP&L to serve Columbia Steel directly for a long time, for PP&L would have to construct a new substation to duplicate the one by which PGE was already serving Columbia Steel. (CR 223, ¶ 82.) Columbia Steel therefore demanded that PGE temporarily "wheel" PP&L power to Columbia Steel over PGE lines. (App. F 9-10.) That was the same method that the 1972 Order had prohibited the utilities from using, even for their own employees. (App. J 8; *see above* at p. 5.)

The disparity in industrial rates that prompted Columbia Steel's desire to switch utilities had been created by OPUC itself through its rate-setting process. And while OPUC had fixed PGE's *industrial* rates *higher* than PP&L's, it had also set PGE's *residential* rates *lower* than PP&L's. (CR 292, Ex. 88, ¶¶ 4-5.) It was only because competition had been eliminated that OPUC could and did establish different rates for PGE and PP&L. (App. L 2.) If sophisticated industrial customers like

Columbia Steel could abandon PGE in search of a lower industrial rate, OPUC at a minimum would have to impose higher rates on PGE's residential customers in order to meet PGE's overall costs. (CR 266, Ex. 45, p. 58; CR 266, Ex. 46, p. 18-19.)

When Columbia Steel was demanding to switch from PGE to obtain the lower PP&L rate, the Oregon Department of Justice notified PGE and PP&L as follows:

> "The PUC believes that ... there has been an allocation of territory such that Pacific [PP&L] cannot offer service to a customer in PGE's territory. ... [W]e read Order No. 72-870 to have made an allocation." (App. U.)

Following this guidance from the State of Oregon, PGE accordingly rejected Columbia Steel's demand that PGE wheel PP&L power to Columbia Steel over PGE lines. PGE stated that Columbia Steel had to buy its electricity from PGE. (ER 66.) The district court would later hold that this "assertion by PGE of an exclusive right to provide electric services to Columbia Steel" entitled Columbia Steel to summary judgment for treble damages from PGE. (App. F 22.)

Columbia Steel sues.

Twenty days after PGE's rejection of Columbia Steel's demand, Columbia Steel filed its complaint alleging that PGE had monopolized or attempted to monopolize the service area that had been designated as PGE's, in violation of Section 2 of the Sherman Act.[4] (15 U.S.C. § 2.) Jurisdiction was based on 28 U.S.C. §§ 1331 and 1337.

---

[4] PP&L also filed a complaint for a declaratory judgment to resolve the dispute. (ER 1.) The district court consolidated the two cases, and some of the district court opinions bear the caption of PP&L's declaratory action.

According to Columbia Steel, OPUC's 1972 Order was deficient, and did not effect an allocation of Portland between PGE and PP&L. Since OPUC held the opposite view, Columbia Steel named OPUC as a defendant, and demanded an injunction to prevent OPUC from enforcing its interpretation of its own Order[5]. (ER 35 ¶ 28; ER 38 ¶ 39; ER 39 ¶ 3A, ER 166 ¶ 89; ER 170 ¶ 103).

OPUC rules that it had allocated Portland in 1972 pursuant to Oregon law.

PGE commenced a proceeding before OPUC, seeking a declaratory ruling that the 1972 Order had indeed been effective to allocate Portland.[6] (App. M 3.) Columbia Steel intervened in this OPUC proceeding to oppose such a declaration. (App. M 3-4.)

OPUC ruled in favor of PGE in Order No. 92-557 (1992 Order). (App. M.) OPUC held that not only had it intended to make an allocation in its 1972 Order, but that it had in fact done so. (App. M 1, M 23.) OPUC declared that "the previous allocations" of 1972 were "confirmed". (App. M 1.) OPUC's opinion explained that all the requirements of the Oregon statutes for such an allocation had been met by its 1972 Order, despite some possible ambiguities which it corrected nunc pro tunc. (App. M 18, 23.) As for the City's opposition to exclusive franchises, OPUC held that its powers under the statute were paramount over the City Charter. (App. M 11-13.)

---

[5] Oregon has a three-member Public Utility Commission, and Columbia Steel's complaint named each as a defendant. In 1972, however, Oregon had a single "Public Utility Commissioner". This petition uses "OPUC" as shorthand for both.

[6] PGE's application for a declaratory ruling had three parts. The first part sought the declaratory ruling stated above. Parts two and three sought alternative relief, in the event that part one was denied. (App. M 3.)

Columbia Steel petitioned for reconsideration, but OPUC adhered to its ruling in Order 92-1135[7]:

> "The correction to Order No. 72-870 supplied missing statutory citations to clarify the decisions made. The correction does not give retroactive effect to Order No. 92-557, but conforms Order No. 72-870 to the actual decisions made and followed.... While the wording of Order No. 72-870 might have been clearer in some respects, there was no doubt as to its substance." (App. N 2.)

Columbia Steel appealed OPUC's decision in accordance with the Oregon procedure by filing a complaint in Oregon circuit court. The Oregon circuit court affirmed the OPUC 1992 Orders. (App. O.) Columbia Steel then appealed to the Oregon Court of Appeals, which affirmed without opinion. (App. P.) The Oregon Supreme Court denied review. (App. Q.)

> *The district court, however, rules to the contrary that OPUC did not allocate Portland in 1972 in accordance with Oregon law. The court imposes treble damages on PGE.*

Although Columbia Steel's arguments were rejected by final Order of OPUC and final judgment of the Oregon courts, that did not deter the federal courts below from accepting them.

Soon after the OPUC proceeding was commenced, OPUC and PGE had moved for a stay of the district court proceedings in deference to the primary jurisdiction of OPUC. The district court refused, saying that OPUC could present its opinion about its 1972 Order as a party to the district court litigation. (App. D 7-8.)

---

[7] The term "1992 Orders" refers to both Order 92-557 and Order 92-1135.

The district court then granted partial summary judgment to Columbia Steel, holding that OPUC's 1972 Order did not effect an allocation of territories and customers under Oregon law. (App. E 17-18.)

Nine months later, OPUC issued its contrary holding in its 1992 Order set forth above. (App. M.) The district court nevertheless refused to reconsider its own decision in light of the contrary OPUC decision. (ER 136, 143.) The district court also refused PGE's motion to certify to the Oregon Supreme Court the question of the interpretation of the OPUC 1972 Order. (ER 136, 143.)

Columbia Steel amended its complaint to add a new claim under Section 1 of the Sherman Act (15 U.S.C. § 2), alleging that PGE and PP&L's agreement to divide Portland was an unlawful conspiracy. (ER 146.) The district court granted summary judgment to Columbia Steel on this Section 1 claim. (App. F 16, 22.) Columbia Steel was held entitled to the damages it incurred "as a direct result of the assertion by PGE of an exclusive right to provide electric services to Columbia Steel."[8] (App. F 22.) OPUC's contrary holding in the parallel OPUC proceeding had by this time been affirmed by the Oregon circuit court, but the district court again refused to reconsider its own view in spite of the state court judgment between the parties. (App. G 1-3.)

---

[8] The damages stopped running in July, 1991, because Columbia Steel was transferred to PP&L as the result of a settlement. PGE understood by then the direction in which the district court was headed, and transferred PP&L to stop the accrual of further treble damages. In exchange, PP&L transferred property to PGE having equal value to the revenues PGE lost thereby, thus keeping the transfer of Columbia Steel from having an adverse effect on PGE's other ratepayers. (App. F 12.) The OPUC would later enter an Order approving the transfer of Columbia Steel to PP&L, citing a public policy in favor of settling disputes, and concluding that the transfer would not have an adverse effect on PGE's other customers. (App. M 29-30.)

Although it imposed treble damages on PGE, the district court nevertheless acknowledged that PGE's conduct all along had been in conformity with the instructions it had received from OPUC, its regulatory agency:

> "In the years after the 1972 Agreement was signed and after the OPUC issued Order No. 72-870, the OPUC has acted to prevent PGE from duplicating facilities in the territory serviced by PP&L, and vice versa, with the intended effect of eliminating competition in the provision of electric services in the territories which were the subject of the transfer of electric distribution properties and customer accounts in the 1972 Agreement." (App. F 7.)

PGE demanded a right to a jury trial at least on the question whether it acted out of an intent to obey its regulatory agency, or because of the alleged unlawful conspiracy with PP&L. The district court denied the request for a trial, deciding this issue like all the others by summary judgment.

The district court entered final judgment against PGE on the Section 1 claim for $1.4 million. (App. H, I.) Columbia Steel represented that it would dismiss its remaining claims upon collecting the judgment from PGE. (App. H 4.) The judgment was bonded, and there is no reasonable doubt that Columbia Steel can collect it.

The Court of Appeals' first opinion reverses the district court.

The Court of Appeals' initial opinion reversed the district court, and held that PGE was protected by the state action doctrine. (App. C.) The court acknowledged that the Oregon legislature had clearly articulated a policy to replace competition with regulation. (App. C 8.) It acknowledged that OPUC was actively engaged in supervising the division of the Portland market. (App. C 18.)

This first opinion also held, as did the later opinions, that the 1972 Order authorizing the allocation of Portland must itself satisfy the "clear articulation" test of the state action doctrine. (App. C 8.) As to whether it did, the court said that "the 1972 Order is not particularly clear regarding the PUC's intention to permit a permanent division of the Portland market". (App. C 12.) The opinion nevertheless concluded that such a permanent division was a "foreseeable" result of the 1972 Order, applying the "foreseeability" test articulated in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985). (App. C 10, 12.) This first opinion held that PGE's conduct met that test. *Id.*

The Court of Appeals' second and third opinions affirm the district court.

Columbia Steel filed a petition for rehearing, which was supported by an amicus brief from the Antitrust Division of the Department of Justice. The Antitrust Division objected to the following articulation of the "foreseeability test" in the first opinion:

> "[P]rivate conduct is immunized if it is a foreseeable result of state agency action and if circumstances justify an inference that the agency intended to authorize the conduct." (App. C 11.)

The Antitrust Division, however, did not express an opinion whether the case should be decided for or against PGE. (Brief of the United States at 12-13.)

On rehearing, the Court of Appeals reversed itself, vacated its first opinion, and ruled in favor of Columbia Steel in a second opinion. (App. B.) On further rehearing, the Court of Appeals issued a third opinion that slightly modified the second, but adhered to its ruling. (App. A.)

Like the first opinion, the second and third opinions held that the first part of the *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.* 445 U.S. 97, 103-04 (1980) test---clear articulation and affirmative expression by the state of a policy to displace competition---has two subparts. In addition to the usual requirement that the state legislature must express a clear policy, the state *agency* must also express with sufficient clarity that the policy is to apply in the particular case. (App. A 14-15.) The Court then reexamined the OPUC 1972 Order and declared that it was not sufficiently clear to pass the test. (App. A 15.) The 1972 Order did not use the word "exclusive" in describing the service territories in Portland, and the City of Portland had objected to exclusive franchises. (App. A 15.) Nor did the 1972 Order cite the Oregon statute authorizing territorial allocation. (App. A 16.) The Court therefore concluded:

> "In sum, the OPUC did not 'forthrightly state' a policy of the state of Oregon that was 'clear in its purpose' to displace competition in the Portland market with territorial monopolies." (App. B 2, A 17.)

The Court of Appeals then decided it was not bound by OPUC's holding in OPUC's 1992 Orders, nor by the final judgment of the Oregon courts affirming those Orders. However, the Court of Appeals did not mention or address OPUC's reasoning in the 1992 Orders as to why the absence of the word "exclusive" or the absence of a statutory citation in the 1972 Order did not prevent the 1972 Order from effecting an allocation. (App. M 16-23, N 2-3.) Nor did the Court of Appeals mention or address OPUC's reasoning that the City of Portland had been powerless to prevent OPUC from making an allocation of territory in Portland. (App. M 11-12.)

Neither did the Court of Appeals acknowledge that OPUC held that it *had* allocated Portland in 1972. Instead, the Court

of Appeals characterized the issue decided by OPUC as merely one of "intent":

> "The issue decided by the 1992 OPUC is whether the 1972 OPUC had the intent to approve the allocation of exclusive service territories." (App. A 24-25.)

That, said the Court of Appeals, was different from the question that it was deciding. For the purposes of the state action doctrine, it did not matter what the state actually intended. It only mattered whether the state had *expressed* that intent in 1972 with enough clarity to meet the "rigorous" test that the court applied in 1997. (App. A 25.) So even though the Court of Appeals acknowledged there was a final state judgment that PGE had acted in conformity with the intent of the state, PGE was still liable for treble damages because the state had not *articulated* that intent in its 1972 Order with sufficient clarity to satisfy the court:

> "In other words, state-action immunity is a question of federal antitrust law that turns on the clarity of a state's expression of its policy, not the subjective intent of its policymakers."

As for the alleged lack of clarity of the 1972 Order, however, the Court of Appeals did not mention that provision in which OPUC rejected the utilities' proposal for limited wheeling of power to their employees, declaring instead that a customer did not have "the right to choose which utility service he will take", and that all customers" must become the customers of the new utility serving the area." (*See above* at 5.) In the first opinion of the Court of Appeals, this provision had been emphasized in rejecting the argument of Columbia Steel. (App. C 13-14.)

The Court of Appeals therefore affirmed the judgment below, except that it ordered the district court to impose additional damages on PGE. (App. A 35-36.) The district court had limited the damages to a one-year period in 1990-91.

There was evidence, however, that in 1987 Columbia Steel had requested PP&L to provide service, and PP&L refused after having contacted PGE. According to the Court of Appeals, that was enough to justify summary judgment against PGE for treble damages for the 1987-1990 period as well.[9]

REASONS FOR GRANTING THE WRIT

This is a clash between state authority and federal authority. It is undisputed that OPUC, an agency of the state of Oregon, told PGE and PP&L not to compete in Portland. For two decades after the 1972 Order, OPUC consistently took the position that it *had* thereby allocated Portland, and that the utilities were prohibited from competing. That was the very reason that Columbia Steel made OPUC a party defendant to this case. Yet federal law has now imposed treble damages on PGE for doing what it was told to do by the state regulatory agency having authority over PGE.

The purpose of the state action doctrine is to prevent just such conflicts. It is designed to answer the question whether the challenged restraint on competition is truly that of the state, or is merely the action of private parties. *Patrick v. Burget*, 486 U.S. 98, 100 (1988). If it is the state's, the antitrust laws were not intended to interfere. *Midcal*, 103-04.

The decision below stands the state action doctrine on its head. Instead of serving federalism, the Court of Appeals made the state action doctrine a barrier to thwart state policy. The Court of Appeals turned the "clear articulation" requirement into a mechanistic rule by which that the words of a 25-year old state Order fail the Court's rigid standard for "clarity", notwithstanding the state's actual intent, and notwithstanding

---

[9] The court of appeals refused to stay its mandate pending this petition for certiorari, so the additional damages are now being calculated by the district court. The final judgment will be approximately $3.7 million, according to Columbia Steel's calculations.

decades of consistent interpretation and instruction by the state agency.

I. The decision below conflicts with this Court's decisions on the state-action doctrine.

The *Midcal* test distills the state action doctrine into a two-prong test:

> "First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy; second, the policy must be actively supervised by the State itself."

F.T.C. v. Ticor Title Insurance Co., 504 U.S. 621, 632-34 (1992); *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.* 445 U.S. 97, 105 (1980).

As for the first prong of the *Midcal* test, the Court of Appeals and all the parties agree that the Oregon statute satisfies the test, that it clearly articulated and affirmatively expressed a state policy to displace competition in the delivery of electricity to customers. According to precedent, this should have been sufficient. One applies this first prong of the test by looking at what the legislature has said. *Southern Motor Carriers Rate Conference v. U.S.*, 471 U.S. 48, 63, 64 (1985).

> "As long as the State as sovereign clearly intends to displace competition in a particular field with a regulatory structure, the first prong of the *Midcal* test is satisfied."

Id. at 64.

As for the second prong of the test, it is hardly in dispute---at least on the surface. The district court found as a fact that OPUC actively supervised the market division in Portland. (*Supra*, p. 11.) The Court of Appeals dismissed out of hand

Columbia Steel's desultory challenge on this point in its first opinion (App. C 18), and said nothing to the contrary in the second opinion.

If the first prong is satisfied by the Oregon statute, and if the second prong is satisfied by undisputed active supervision - why then was PGE's state action defense rejected?

It was rejected because the Court of Appeals grafted an additional requirement onto the first prong of the *Midcal* test. The first prong, for the Court of Appeals, now has two subparts. *First* is the familiar requirement that the legislature must clearly articulate the policy to displace competition. *Second* is the new requirement that the state *agency* must also clearly articulate that the policy is in force in the particular instance in question. That is, after the Oregon legislature articulated a policy to displace utility competition in Oregon, OPUC had to clearly articulate that it has been displaced in Portland. (App. A 14-15.)

PGE's state action defense failed, according to the Court of Appeals, because of this new second subpart. OPUC, said the Court of Appeals, had not articulated with sufficient clarity that the state policy applied in Portland to displace competition there. (App. A 15.) There are two things wrong with this new graft by the Court of Appeals onto the *Midcal* test.

First, it is out of step analytically with this Court's precedents. When this Court has examined what an *agency* says and does, it has done so under the "active supervision" second prong of the test---not, as did the Court of Appeals here, under the "clear articulation" first prong of the test. Such was the analytic framework under which this Court analyzed *Ticor*: the uniform rates that title insurers had agreed upon had not been sufficiently authorized by the responsible state agencies, and this Court treated that as an *active supervision* question. 504 U.S. at 637-39. *Southern Motor Carriers* followed the same analytic framework, in mirror image: the state agencies there *did*

sufficiently authorize the uniform rates that had been agreed upon by the carriers, and this Court also treated that as an active supervision question. 471 U.S. at 62, 65-66.

If the Court of Appeals had followed the same analytic framework, PGE would have prevailed. There would have been no new subpart to the state action test that required clear articulation by the state agency, and both prongs would have been satisfied.

Second, the analytic error just described masks a more serious one. Cases like *Ticor* are numerous where there is clear articulation by the legislature, but insufficient active supervision. The reverse is much less common: cases where there is active supervision of anticompetitive conduct by the agency, but no clear articulation by the legislature. (The *Lease Lights* case[10] discussed *infra* at p. 26 is one, for the agency was pursuing a policy that had not in fact been authorized, in this case by the state constitution.)

This case, however, is a paradox. The Court of Appeals held that OPUC did not clearly articulate a policy to displace competition in Portland, yet it is an unchallenged finding of fact that OPUC was actively supervising just such a policy for 20 years. Actively supervising a policy that one has not articulated is a difficult feat, especially since OPUC actively supervises the utilities by articulating to them what they should and shouldn't do.[11]

---

[10] *Lease Lights, Inc. v. Public Service Co. of Okla.*, 849 F.2d 1330 (10th Cir. 1988), cert. denied, 488 U.S. 1019 (1989).

[11] This may explain why this Court in the past has analyzed what an agency says and does under the second prong of active supervision, since articulation by the agency and active supervision by the agency are more or less the same thing.

Like many paradoxes, this one conceals something hidden. What is hidden is a serious inroad on the principles of federalism that the state action doctrine is designed to serve.

The Court of Appeals does not really mean that OPUC has not clearly articulated a policy to displace competition in Portland. The record is full of evidence that OPUC has been clearly articulating just that policy for two decades. (*See above,* p. 5) When Columbia Steel was demanding to switch utilities, the Oregon Department of Justice notified both PGE and PP&L that Portland was an allocated territory and had been made so by the 1972 Order. (App. U.) There even is an allegation in Columbia Steel's complaint that for 15 years OPUC was telling customers they could not switch utilities. (ER 160 ¶ 64.) Columbia Steel sued OPUC in the district court below in order to make OPUC *stop* articulating that it had displaced competition in Portland.[12]

What the Court of Appeals really means is that OPUC did not exercise its power in a manner authorized *under Oregon law* in 1972 to provide a foundation for OPUC's subsequent 20 years of clear articulation that Portland had been allocated. The Court of Appeals measured the 1972 Order against the Oregon statutes, and concluded that it didn't measure up. When the Court of Appeals holds that the 1972 Order does not *clearly articulate* a territorial allocation of Portland, it means that the 1972 Order *did not in fact allocate* Portland. The Court of Appeals turned the search for clarity into a search for authority, authority under state law.

---

[12] Columbia Steel alleged in its complaint:

"The PUC contends that the [1972] Agreement created allocated service territories within Portland and that PP&L is barred from providing electric service to Columbia Steel. ... Columbia [Steel] is entitled to an injunction prohibiting the [Commissioners] from seeking to enforce the [1972] Agreement as an exclusive service territory agreement." (ER 35, 38, ¶¶ 35, 39.)

This Court warned against this in *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 370-72 (1991). approving the following observation:

> "To be sure, state law 'authorizes' only agency decisions that are substantively and procedurally correct. Errors of fact, law, or judgment by the agency are not 'authorized.' Erroneous acts or decisions are subject to reversal by superior tribunals because unauthorized. If the antitrust court demands unqualified 'authority' in this sense, it inevitably becomes the standard reviewer not only of federal agency activity but also of state and local activity whenever it is alleged that the governmental body, though possessing the power to engage in the challenged conduct, has actually exercised its power in a manner not authorized by state law. We should not lightly assume that *Lafayette's*[13] authorization requirement dictates transformation of state administrative review into a federal antitrust job. Yet that would be the consequence of making antitrust liability depend on an undiscriminating and mechanical demand for 'authority' in the full administrative law sense." P. Areeda & H. Hovenkamp, Antitrust Law ¶ 212.3b, p. 145 (Supp. 1989).

This Court then added:

> "We agree with that assessment, and believe that in order to prevent *Parker*[14] from undermining the very interests of federalism it is designed to protect, it is necessary to adopt a concept of authority broader than what is applied to determine the legality of the municipality's action under state law." *Id.* at 371-72.

---

[13] *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978).

[14] *Parker v. Brown*, 317 U.S. 341 (1943).

The Court of Appeals failed to heed this warning. It acted as if it were an Oregon appellate court, measuring the decisions of an Oregon administrative agency against the Oregon statutes. It was not, however, the job of the Court of Appeals to derail OPUC's policy by finding "errors of fact, law, or judgment" in the OPUC's 1972 Order. That was a job for OPUC itself, subject to review by the Oregon courts.

The job of the Court of Appeals was a different one, and the Court lost sight of it. It purported to apply the first prong of the *Midcal* test, but it did not. The *purpose* of the clear articulation requirement in the first prong is to ensure "that the State has not acted through inadvertence". *Ticor*, 504 U.S. at 636-37. "Inadvertence" is the least likely word that describes OPUC's decades-long insistence that competition had been displaced in Portland.

It is telling that the Court of Appeals disclaims any search for the state's *intent*. In explaining why its decision is not foreclosed by the contrary 1992 OPUC decision, it declares that the "issue decided by the 1992 OPUC is whether the 1972 OPUC had the intent" to allocate Portland. That, it says, is a different issue than the one the Court of Appeals was deciding. (App. A 24-25.) This is exactly backwards of what it should have been doing. The "intent" of OPUC is the ultimate and only question to be answered by the clear articulation requirement:

> "As long as the State as sovereign clearly *intends* to displace competition in a particular field with a regulatory structure, the first prong of the *Midcal* test is satisfied." *Southern Motor Carriers*, 471 U.S. at 64.

Because the Court of Appeals misconceived its job, it looked backwards from the 1972 Order to focus on the concerns of the City of Portland that preceded that Order, and the accommodations that flowed from them. Had it focused on its

proper task of ascertaining whether it was the *state* that was suppressing competition in Portland in 1987, it would have looked *forward* from the 1972 Order, not backwards.

The will of OPUC to displace competition in Portland was manifest from 1972 onwards. The Court of Appeals failed to appreciate that suppression of competition in Portland was essential to the rate policy that OPUC imposed in Portland from 1974 forward, and that rate regulation is the fundamental task of OPUC.

As long as there had been competition, OPUC had no choice but to impose the same rates for PGE and PP&L in Portland. (*See above,* p. 6; App. L.) Beginning in 1974, however, OPUC imposed different rates for PGE and PP&L. It did so in the service of other OPUC policies. *Id.* For example, as long as Portland had been a competitive market and OPUC had had to maintain equal rates between PGE and PP&L, OPUC had to keep PP&L rates in Portland *lower* than in other parts of the state. This imposed discriminatory rates on other PP&L customers outside of Portland. The elimination of competition in Portland allowed OPUC to equalize rates among PP&L customers. (App. L, T.) *American Can Co. v. Davis*, 28 Or. App. 207, 225, 559 P.2d 898, 909 (1977).

OPUC could not maintain the integrity of its differential rate structures if large industrial customers like Columbia Steel switched utilities, thereby abandoning to the residential customers the burden of supporting the rate base.[15] When

---

[15] The court of appeals betrayed a startling naivete on this point. The opinion finds that Columbia Steel's argument has "considerable force" because PP&L "was able to take a good customer away from PGE", for its rates "were more competitive than PGE's." (App. A 19.) If competition were really permissible in this market, PGE's lower *residential* rates that OPUC had set would bring it all the residential customers, PP&L's lower *industrial* rates that OPUC had set would bring it all the industrial customers, and OPUC would have to start all over again with a new rate structure, for it is obliged to set rates high enough to produce a sufficient return to each

OPUC told PGE and PP&L that a customer like Columbia Steel could not switch, there was a more important state policy at issue than whether the 1972 Order was missing a statutory citation. The federal courts below made PGE a scapegoat for complex regulatory policies they did not perfectly understand.

The Court of Appeals' new addition to the state action doctrine is now a means by which it can overturn current state administrative policies of which it disapproves by finding errors in foundation documents that are decades old. This Court alluded in *Omni* to the limits that a federal court should observe in undertaking just such a task. This Court should now grant certiorari to clarify the limitations on a federal court reviewing decisions of state administrative agencies.

II. The decision below conflicts with decisions of the Eleventh Circuit and the Tenth Circuit.

A. The Eleventh Circuit decision in *Praxair*.

The decision of the Court of Appeals conflicts with the decision of the Eleventh Circuit in *Praxair, Inc. v. Florida Power & Light Co.*, 64 F.3d 609 (11th Cir. 1995), cert. denied, __ U.S. __, 116 S.Ct. 1678, 134 L.Ed.2d 781 (May 13, 1996).

Praxair, a large industrial customer, wanted to switch from Florida Power & Light (FPL) to Florida Power Corp. (FPC). There was an ambiguity about an order of the Florida Public Service Commission as to whether it had made a territorial allocation to either utility of the county in which Praxair's plant was located.

The District Court in Florida, like the Court of Appeals below, limited its inquiry to the parties' original agreement and to the original order, which it found to be unclear. The Eleventh Circuit rejected the District Court's restricted

---

utility.

interpretation of the state action doctrine, and reversed. The issue, said the Eleventh Circuit:

> "is whether state action can be inferred from the manner in which the State conducts itself in relation to the parties' attempts at competition." *Id.* at 610.

The Eleventh Circuit held that the District Court erred by not considering what had happened in the years *after* the Commission had issued its order.

> "In our judgment, the district court erroneously focused primarily on the utilities' and Commission's intent in the original proceedings which culminated in the 1965 approval order, and did not give proper consideration to the parties' conduct and the Commission activity since that time." *Id.* at 612.

As for the degree of clarity that was necessary in the original agreement, the Eleventh Circuit did not impose the "rigorous" test of "clear articulation" that the Court of Appeals imposed below. Instead, the Eleventh Circuit inquired whether it was "plausible" or "reasonable" that the agreement might be interpreted to allocate the county. The Eleventh Circuit went on to hold that:

> "Even if it was not clearly intended in the original agreements to include Brevard County, however, the way the parties and particularly the Commission have conducted themselves since that time indicates that Brevard County has been allocated to FPL's service area. An agency's interpretation of its own regulations must be given controlling weight unless that interpretation is plainly erroneous or inconsistent with the regulation. ... For 30 years since that time, the Commission and the utilities have treated [the town in Brevard County] as part of Florida Power & Light's service territory. ... Florida's regulatory scheme met

> the two-pronged *Midcal* test so that the utilities are immune from Sherman Act challenges." *Id.* at 613-14.

The case below would have come out the opposite way under the Eleventh Circuit's interpretation of the state action doctrine. The Eleventh Circuit searched for the intent of the State. The Court of Appeals below rejects the search for intent. The Eleventh Circuit treated the issue as one of fact. The Court of Appeals below expressly denies that it is one of fact. (App. A 25.) Most important, the Eleventh Circuit looked to the history after the original order to make its decision, while the Court of Appeals refused to be dissuaded by the havoc it might wreak on state policies evolved over the succeeding decades. The Eleventh Circuit's approach is sensitive to the state's interests. The Court of Appeals below is indifferent to them.

B. The Tenth Circuit decision in *Lease Lights*.

The decision of the Court of Appeals conflicts with the decision of the Tenth Circuit in *Lease Lights*.

In *Lease Lights*, the Oklahoma Corporation Commission ordered the utility to restructure its rates for outdoor lighting. Independent lighting contractors were injured, and filed a treble damage action. The Oklahoma Supreme Court eventually overturned the rates ordered by the Commission as constitutionally invalid. The Tenth Circuit nevertheless held that the utility was immunized by the state action doctrine:

> [T]here should be a defense for those reasonably relying on the appearance of legality when a state agency's exercise of power is unauthorized. *See* P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 212.4b, at 132 (Supp. 1987). To rule otherwise would require regulated industries to seek judicial review of every order of a regulatory agency to ensure that compliance

> does not later subject them to antitrust liability." *Id.* at 1334.

The conflict with the decision of the Court of Appeals below needs little comment. Even if OPUC's directions were unauthorized under state law, PGE should not be punished for obeying them. This is a fundamental issue of the greatest importance to all regulated industries, and federal law should not subvert state policies by punishing utilities who obey directions in good faith.

III. The decision below is in conflict with a final judgment of an Oregon court, to which the Court of Appeals refused to give full faith and credit.

One reason why federal courts should refrain from acting as reviewers of state administrative agencies is that states already have a system to do that. If the federal courts undertake to do the same thing, there is a risk of collision.

Whether the 1972 OPUC order allocated Portland was an issue of state law. The most authoritative forum to decide that issue was an Oregon forum: OPUC itself, subject to review in the Oregon courts. That issue was therefore submitted to OPUC in the 1990-92 proceeding. The federal courts below should not have undertaken to decide the same issue. Least of all should they have undertaken to decide it contrary to the state decision.

The fundamental holding of the 1992 Order was printed in bold letters on the cover of that order:

> "DISPOSITION: TERRITORIAL ALLOCATION CONFIRMED"

(App. M 1.) That is, OPUC held that Portland was already allocated between PGE and PP&L, and had been since 1972.

On rehearing, overruling Columbia Steel's arguments on that point, OPUC again declared that Portland had been allocated by the 1972 Order itself. (*See above* at pp. 8-9.)

Columbia Steel challenged OPUC's decision on appeal to the Oregon courts. Columbia Steel's appeal ended in a final state court judgment *between these parties* confirming that Portland has been an allocated territory since 1972.

The Court of Appeals below nevertheless refused to honor that final state judgment affirming the 1992 Orders. The issue decided in the state forum supposedly was not "identical" to the issue it was deciding. It held that the issue decided in the state forum was the "intent" of the state, while it decided instead whether the displacement of competition was "clearly articulated and affirmatively expressed" as state policy. (App. A 25.)

There are two grave flaws in what the Court of Appeals did. First, it turned a determinedly blind eye to what the state decision actually held. OPUC's 1992 Orders declare what OPUC had *done* in 1972, not merely what it had intended to do.

Second, as we have said, the "intent" of the state is something the Court of Appeals *should* have been trying to ascertain itself. As for the label "subjective intent" in the Court of Appeals' opinion---the word "subjective" is a dismissive epithet by which the Court of Appeals would discount the reasoning process behind a judgment it does not intend to honor.

OPUC's reasoning process in its 1992 Orders was no more "subjective" than that of the Court of Appeals. OPUC engaged in the same kind of legal analysis as did the Court of Appeals, except that it did it better. For example, the Court of Appeals set great store by the absence of a citation to the *number* of the allocation statute in the 1972 Order. (App. A 16.) OPUC, however, found it more significant that the 1972 Order used the *language* of the allocation statute (Or. Rev. Stat. § 758.415) to

make statutory findings, the effect of which were to create an allocation by operation of law without anything more.[16] (App. M 18.) For OPUC, substance was more important than form; for the Court of Appeals, vice versa.

A second example: OPUC in the 1972 Order explicitly ordered the transfer of thousands of customers. In the 1992 Orders, OPUC pointed out that it could only have done so under the allocation statute. (App M 18.) The Court of Appeals ignores what OPUC says it could do and did do, and instead hypothesizes that OPUC's transfer of customers must instead have been merely a one-time "incident" to a transfer of property. In order to reach its result, the Court of Appeals has to attribute to an Oregon agency a power under Oregon statutes that the agency itself has declared that it does not possess.

However, we did not file this petition to ask this Court to decide that OPUC's analysis of its own Order is better than the Court of Appeals' analysis. We filed this petition to ask this Court to hold that the Court of Appeals overstepped its bounds. If the Court of Appeals had heeded the warning of *Omni*, it would have hesitated from the beginning to start down this road to override a state agency's interpretation of its own orders and its state's statutes. That road belongs to the state agency and the state courts. If the federal courts insist on occupying it as well, the risk of collision is great.

There is a collision in this case. The state proceeding conclusively established, as between these same parties, that it was illegal under state law after 1972 for PGE and PP&L to compete in Portland. The federal proceeding established that it was illegal under federal law *not* to compete. If the decision below stands, then state and federal law imposed upon PGE a choice of poisons. The Court of Appeals now punishes PGE

---

[16] After all, why would the 1972 OPUC have used the language of the allocation statute, Or. Rev. Stat. § 758.415, if it was not acting under that statute?

with treble damages for the offense of having correctly understood and obeyed its regulatory agency and state law. OPUC regulates, and the federal court inflicts a catastrophe for complying with that regulation. This is no way to run a regulated industry, and it is no way to run a federal system.

The conflict would never have reached this point if the Court of Appeals had given full faith and credit, as required by 28 U.S.C. § 1738, to the final state decision, binding upon these same parties, that Portland has been lawfully allocated since 1972. When a United States Court of Appeals fails to honor a state judgment, it is a blow to federalism. It is a blow for which there can be no remedy, save in this Court.

IV. The questions presented are important.

The industry is undergoing massive changes. There are movements underway at the federal and state level to reintroduce competition into the sale of electricity. Deregulation, wheeling, access to transmission systems are the subject of intense planning in the Federal Energy Regulatory Commission (FERC), in state regulatory commissions, and in the utilities.

The coming changes involve uncommon problems in finding what degree of competition can coexist with the necessity of having a single utility continue to deliver the power in any given area. FERC has recently issued a 500-page rule that grapples with some of these novel problems. *See* 18 C.F.R. Part 35.

There will be missteps, and there will be orders issued by regulatory commissions that in the hindsight of 20 years later will seem ambiguous and perhaps even invalid. But it will not aid the current process if the orders that are issued, balancing regulation with competition, are treated by the federal courts as potential time bombs that may explode in treble damages years later.

V. PGE should at least have a jury trial.

It was fundamentally unjust to impose treble damages by summary judgment for a supposedly unlawful conspiracy, when PGE should at least have been given the opportunity to present to a jury that its actions were not prompted by any supposed conspiracy, but by a desire to obey the orders of its regulatory agency.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Barbee B. Lyon
Counsel of Record
James C. Loy
David S. Aman
TONKON, TORP, GALEN,
MARMADUKE & BOOTH
1600 Pioneer Tower
888 SW Fifth Avenue
Portland, OR 97204-2099
(503) 221-1440
Attorneys for Petitioner

Filed July 2, 1997

Supreme Court, U.S.
FILED

(2)

97 - 49 JUL 2 1997

No. OFFICE OF THE CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1997

PORTLAND GENERAL ELECTRIC COMPANY,

Petitioner,

v.

COLUMBIA STEEL CASTING CO., INC.

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Barbee B. Lyon
Counsel of Record
James C. Loy
David S. Aman
TONKON, TORP, GALEN, MARMADUKE & BOOTH
1600 Pioneer Tower
888 SW Fifth Avenue
Portland, OR 97204-2099
(503) 221-1440
Attorneys for Petitioner

Filed July 2, 1997

241 pp

TABLE OF CONTENTS OF APPENDIX

Page

Items Required by Rule 14.1(i)(i)

A-C

APPENDIX A

Amended Opinion of the U.S. Court of Appeals for the Ninth Circuit and Order Amending Opinion and Denying Petition for Rehearing A-1

APPENDIX B

Excerpt from December 27, 1996 Order and Amended Opinion of the U.S. Court of Appeals for the Ninth Circuit B-1

APPENDIX C

July 20, 1995 Opinion of the U.S. Court of Appeals for the Ninth Circuit C-1

Items Required by Rule 14.1(i)(ii)
Opinions and Orders of the District Court Below

D-I

APPENDIX D

September 27, 1990 Opinion of the U.S. District Court for the District of Oregon D-1

APPENDIX E

July 3, 1991 Opinion of the U.S. District Court for the District of Oregon E-1

APPENDIX F

February 4, 1993 Opinion of the U.S. District Court for the District of Oregon F-1

APPENDIX G

May 28, 1993 Opinion and Order of the U.S. District Court for the District of Oregon G-1

APPENDIX H

August 10, 1993 Opinion of the U.S. District Court for the District of Oregon H-1

APPENDIX I

Judgment Pursuant to Fed. R. Civ. P. 54(b) of the U.S. District Court for the District of Oregon I-1

Opinions and Orders of the Oregon Public Utility Commission and of the Oregon Courts

J-Q

APPENDIX J

December 15, 1972 Order No. 72-870 of the Public Utility Commissioner of Oregon; Case No. UF 2947 . . . . . J-1

APPENDIX K

Excerpt from October 25, 1973 Order No. 73-688 of the Public Utility Commissioner of Oregon; Case No. UF 3001 . . . . . K-1

APPENDIX L

Excerpt from September 3, 1974 Order No. 74-658 of the Public Utility Commissioner of Oregon; Case No. UF 3074 . . . . . L-1

APPENDIX M

April 16, 1992 Order No. 92-557 of the Public Utility Commission of Oregon; Case Nos. UA 37, UA 41 . . . . . M-1

APPENDIX N

August 7, 1992 Order No. 92-1135 of the Public Utility Commission of Oregon; Case Nos. UA 37, UA 41 . . . . . N-1

APPENDIX O

February 16, 1993 Judgment of the Circuit Court of the State of Oregon for the County of Marion, Affirming Public Utility Commission of Oregon Order Nos. 92-557 and 92-1135; Case No. CA 92C-12005 . . . . . O-1

APPENDIX P

December 15, 1993 Order of the Court of Appeals of the State of Oregon, Affirming Without Opinion the February 16, 1993 Judgment of the Marion County Circuit Court in Case No. 92C-12005; Case No. CA A 79041 . . . . . P-1

APPENDIX Q

March 22, 1994 Order of the Supreme Court of the State of Oregon, Denying Review of the Court of Appeals order in Case No. CA A79041; Case No. SC S40990 . . . . . Q-1

Item Required by Rule 14.1(i)(iii)

(The Order on Rehearing is included in Appendix A.)

Item Required by Rule 14.1(i)(v)

R

APPENDIX R

Excerpts from Oregon Revised Statutes Chapters 757 and 758 . . . . . R-1

Items Permitted by Rule 14.1(vi)

APPENDIX S

1972 Agreement Between Pacific Power & Light Company and Portland General Electric Company S-1

APPENDIX T

Excerpt from June 7, 1974 Transcript of Proceedings before the Public Utility Commissioner of Oregon [testimony of OPUC staff witness Evan White]; Case No. UF 3074 . . . . . T-1

APPENDIX U

April 16, 1990 Letter from the Oregon Department of Justice U-1

APPENDIX A

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

COLUMBIA STEEL CASTING CO., INC., an Oregon corporation, Plaintiff-Appellee, v. PORTLAND GENERAL ELECTRIC COMPANY, an Oregon corporation; Defendant-Appellant	No. 93-35902 D.C. No. CV-90-00592-HJF
COLUMBIA STEEL CASTING CO., INC., an Oregon corporation, Plaintiff-Appellant, v. PORTLAND GENERAL ELECTRIC COMPANY, an Oregon corporation; Public Utility Commission of the State of Oregon, Defendants-Appellees.	No. 93-35958 D.C. No. CV-90-00524-HJF ORDER AMENDING OPINION AND DENYING PETITION FOR REHEARING AND AMENDED OPINION

Appeals from the United States District Court
for the District of Oregon
Helen J. Frye, District Judge, presiding

Argued and Submitted
May 3, 1995 - Portland, Oregon

Filed July 20, 1995
Opinion Withdrawn December 27, 1996
Filed December 27, 1996
Amended April 3, 1997

Before: James R. Browning, Thomas M. Reavley*, and
William A. Norris, Circuit Judges.

Opinion by Judge Norris

ORDER

The opinion filed on December 27, 1996 [App. B] is amended as follows:

Add to the end of footnote 8 at slip op. at 16278 [App. B] the following two sentences:

> Since the Oregon statute speaks solely of authorizing the OPUC to approve exclusive service territories, the state's clearly articulated policy is to have the OPUC decide whether to sanction anticompetitive conduct. It follows, therefore, that we must look to the decisions of the OPUC to determine whether PGE's conduct was part of a clearly articulated state policy. *Cf.*

---

* The Honorable Thomas M. Reavley, Circuit Judge, United States Court of Appeals for the Fifth Circuit, sitting by designation.

Ticor, 504 U.S. at 636-37 (first prong of *Midcal* test intended to ensure state has not acted through inadvertence).

Replace the first full paragraph at slip op. at 16298 [App B] with the following paragraph:

As for PGE's second argument, the only authority it cites is the 1972 Order stating that "[t]here can be no question that the Commissioner has regulatory approval over any such transfers or exchanges of customer," 1972 Order at 6. However, when read in context, this statement refers only to the joint application by PGE and PP&L for the transfer of tens of thousands of customers *without the customers' permission*. It has no application, therefore, to Columbia Steel's request to be transferred, as a customer, from PGE to PP&L. In the absence of any further analysis or authority for PGE's argument that OPUC approval was necessary for Columbia Steel to become a customer of PP&L, we cannot hold that it has any merit.

With the above amendments, the panel, as constituted above, has voted unanimously to deny the petition for rehearsing. Judge Browning has voted to reject the suggestion for a rehearing en banc, and Judges Reavley and Norris have recommended the same.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(B).

The petition for rehearing is DENIED, and the suggestion for a rehearing en banc is REJECTED.

OPINION

NORRIS, Circuit Judge:

TABLE OF CONTENTS

I. Facts and Procedural History . . . . . [A-5]

II. State-Action Immunity . . . . . [A-13]
A. The Midcal Clear Articulation Requirement . . . . . [A-13]
B. Issue Preclusion . . . . . [A-23]
C. Foreseeability: PGE's New Argument on Appeal . . . . . [A-26]

III. PGE's Other Defenses . . . . . [A-29]
A. Statute of Limitations . . . . . [A-30]
B. Justification Defenses . . . . . [A-31]
C. The Noerr-Pennington Doctrine . . . . . [A-33]
D. The Filed Rate Doctrine . . . . . [A-33]

IV. Damages . . . . . [A-34]

V. Columbia Steel's Cross-Appeal on Damages . . . . . [A-35]

VI. Conclusion . . . . . [A-36]

This appeal arises out of an antitrust action that Columbia Steel Casting Co., a large consumer of electric power in Portland, Oregon, brought against two electric utilities, Portland General Electric (PGE) and Pacific Power & Light (PP&L), charging them with dividing the city of Portland into exclusive service territories in violation of the Sherman Act, 15 U.S.C.

§§ 1-2[1]. PGE raised a state-action immunity defense on the basis of a 1972 order of the Oregon Public Utility Commission which, PGE argued, approved a division of the Portland market into exclusive service territories. *See Parker v. Brown*, 317 U.S. 341 (1943). The district court rejected this state-action immunity defense and awarded summary judgment to Columbia Steel. PGE appeals the summary judgment in favor of Columbia Steel and the denial of its own motion for summary judgment. Columbia Steel cross-appeals the amount of its damage award. We affirm the summary judgment in favor of Columbia Steel on PGE's antitrust liability and vacate and remand the damage award for further proceedings.

I. Facts and Procedural History

The facts are undisputed. Until 1972, PGE and PP&L competed for customers throughout Portland. This competition resulted in the duplication of transmission lines and poles, substations, and transformers throughout the city. For many years the two utilities attempted to gain regulatory approval for a division of the Portland market into exclusive service territories. In 1962, for example, PGE applied to Oregon's Public Utilities Commission (OPUC) for an allocation of an exclusive service territory in the city of Portland[2]. These efforts to secure exclusive service territories within Portland were unsuccessful, however, in part because of opposition from the city. Portland had a long-standing policy of encouraging competition among utilities, and the city charter provided that "[n]o exclusive franchises shall be granted." Portland City

---

[1] Only PGE is a party to this appeal.

[2] In 1961, the Oregon legislature enacted a statute vesting in the OPUC exclusive authority to approve the creation of exclusive service territories in order to promote "[t]he elimination and future prevention of duplication of utility facilities." Or. Rev. Stat. § 758.405. The statute authorizes the OPUC to approve contracts between competitors that divide markets into exclusive service territories. Or. Rev. Stat. §§ 758.410 - 758.425, 758.450.

Charter, § 10-206. *See, e.g.*, Portland, Or., Resolution 28879 (1962) (opposing PGE's 1962 application to the OPUC for an "allocation of exclusive areas for electric service within . . . Portland").

In 1972, PGE and PP&L jointly submitted to the city of Portland a plan to eliminate competition between them by dividing the city into exclusive service territories. This plan provided, *inter alia,* that "[s]ubject to the necessary regulatory approvals . . . it is proposed that Parcels A & B [two defined areas within the city of Portland] be served exclusively by PP&L," and that "[s]ubject to the necessary approvals, it is proposed that Parcel C [a defined area within the city of Portland] . . . be exclusively served by PGE." CR 269, exh. 47 at 2-3.

The Portland City Council disapproved the utilities' 1972 plan to displace competition with territorial monopolies in Portland. The City Council agreed, however, that the duplication of facilities should be eliminated for aesthetic, safety, and economic reasons. In the ordinance it passed, the City Council declared, "both [PGE and PP&L] operate under non-exclusive franchises and...the obligation to supply properties within the City must remain binding upon both companies." Portland, Or., Ordinance 134416 (Apr. 26, 1972). The only action that the ordinance approved was "the sale, transfer and exchange of plant and property between Portland General Electric Company and Pacific Power & Light Company."[3] *Id.*

---

[3] The Ordinance states, in part:

An Ordinance consenting to exchange of certain property within the City between [PGE] and [PP&L] on certain conditions in order to permit reduction of poles and wires and duplication of facilities in various areas of the City.

The City of Portland ordains:

Section 1. The Council finds that both [PGE] and [PP&L] operate

After securing the City Council's approval of the exchange of utility properties, but not the establishment of exclusive service territories, PGE and PP&L entered into an agreement, dated July 18, 1972 (the "1972 Agreement"), which they submitted to the OPUC for approval. In contrast to the plan submitted to the Portland City Council, the 1972 Agreement said nothing about exclusive service territories in Portland. The "whereas" clauses of the 1972 Agreement recited that one of its purposes was to comply with the terms of the Portland ordinance, which had approved an exchange of plant and property, but had disapproved exclusive service territories. The 1972 Agreement recited:

> WHEREAS, [PGE] and [PP&L] wish to provide for the elimination of duplicating electric facilities in [the city of Portland]; and
>
> WHEREAS, the City of Portland, by Ordinance No. 134416, passed April 26, 1972, effective May 26, 1972, consented to the exchange by [PGE] and [PP&L] of certain properties located within the city;
>
> NOW, THEREFORE, in order to implement the elimination of said duplicating facilities and to comply with Ordinance 134416, it is agreed...

---

electric power systems which serve patrons within the City, that *both companies operate under non-exclusive franchises and that the obligation to supply properties within the City must remain binding upon both companies;* that at the present time, however, in many areas of the City poles and wires are duplicated between the companies for service purposes...; that to reduce the visual impact of duplicating facilities, to promote safety, to promote economy, to simplify subsequent undergrounding and to work toward the lowest possible rates for users within the City, and interchange of properties between the companies should be permitted as hereinafter set forth;...now, therefore, *the City does by this ordinance consent to the sale, transfer and exchange of plant and property between [PGE] and [PP&L]* as follows. ....

Portland, Or., Ordinance 134416 (Apr. 26, 1972) (emphasis added).

1972 Agreement at 1-2.

The 1972 Agreement used the following language to effect the exchange of facilities:

> 1. *Exchange of Facilities*
>
> (a) [PP&L] shall transfer and convey to [PGE] and [PGE] shall acquire from [PP&L] all of the electric distribution plant, including distribution substations, poles, lines, transformers, meters, related distribution facilities, and all easements necessary for the operation thereof, owned, operated and maintained by [PP&L] in . . . the area [in Portland] designated as Parcel C . . . .
>
> (b) [PGE] shall transfer and convey to [PP&L] and [PP&L] shall acquire from [PGE] all of the electric distribution plant, including distribution substations, poles, lines, transformers, meters, related distribution facilities, and all easements necessary for the operation thereof, owned, operated and maintained by [PGE] in the areas [in Portland] designated as Parcels A and B . . . .

1972 Agreement at 2-3.

The 1972 Agreement was approved by an order of the OPUC issued in December 1972. The 1972 Order provided, in relevant part:

> The Commissioner's approval is needed prior to the sale, lease, assignment or other disposition of public utility property pursuant to ORS 757.480. . . .
>
> On July 18, 1972, [PP&L] and [PGE] entered into an agreement whereby an exchange of property and utility facilities would be made between [PGE and PP&L] in the City of Portland. . . . This exchange . . . also involves the transfer of customers from one party to the other.

. . . .

ORDERED that [PP&L] may transfer to [PGE] all electric distribution plant . . . situated within or used for providing utility service within the boundaries of Parcel A . . . [and] Parcel B. . . .

ORDERED that [PGE] may transfer to [PP&L] all electric distribution plant . . . used for providing utility service within the boundaries of [Parcel C] . . . .

ORDERED that the manner and method of accomplishing the transfer and exchange of property, facilities and customers, and the terms and conditions governing this transfer, shall be provided by that agreement between the companies herein, dated July 18, 1972.

Pub. Util. Comm'n of Or., Order 72-970 (Dec. 15, 1972) (the "1972 Order").[4]

---

[4] The only reference to customer accounts in the 1972 Agreement is in Section 7, which provides in relevant part:

7. *Transfer of Customer Accounts*

The transfer of customer accounts between [PGE] and [PP&L] shall commence on July 24, 1972, and shall be coordinated so that the revenues from the sales of electricity of each company will remain substantially the same over the period required to accomplish transfer of all customers involved. . . .

There is no reference to customer accounts in Section 1 of the 1972 Agreement, which provides for the exchange of facilities. In referring to the transfer of customers, Section 7 does not use the "shall transfer and convey" language used in Section 1. Thus the language and structure of the 1972 Agreement, as well as the language of the 1972 Order quoted in the text, suggest that the transfer of customers was treated as a necessary incident to the exchange of facilities. For a further discussion of the transfer of customers, see *infra* pp. 17-19.

In approving the exchange of property in the city of Portland, the OPUC did not cite any of the statutory provisions that give the OPUC its authority to approve contracts between utility companies allocating exclusive service territories. *See* Or. Rev. Stat., ch. 758 ("Utility . . . Territory Allocation . . .").[5] Unlike the Portland City Council ordinance -- which had expressly disapproved exclusive service territories -- but like the 1972 Agreement, the 1972 Order said nothing about exclusive service territories in Portland. The OPUC cited as authority for its approval of the 1972 Agreement Chapter 757 of the Oregon Revised Statutes ("Utility Regulation Generally"), specifically Or. Rev. Stat. § 757.480,[6] which gives the OPUC authority to

---

[5]Chapter 758 of the Oregon Revised Statutes speaks of "allocated" territories and defines that term in a way that means exclusive service territories. Section 758,400(1) defines "allocated territory" as "an area with boundaries established by a contract between persons furnishing a similar utility service and approved by the commission or established by an order of the commission approving an application for the allocation of territory"). Or. Rev. Stat. § 758.400(1). Section 758.410(1) permits "[a]ny person providing a utility service [to] contract with any other person providing a similar utility service for the purpose of allocating territories and customers are to be served by which of said contracting parties." Or. Rev. Stat. § 758.410(1). Section 758.425 authorizes the OPUC to approve the "contract as filed" and provides that "[I]f the commission approves [the] contract . . . the contract shall be deemed to be valid and enforceable . . . ." Or. Rev. Stat. § 758.425. Section 758.450(2) provides that "no other person shall offer, construct or extend utility service in or into an allocated territory." Or. Rev. Stat. § 758.450(2).

[6]Section 757.480 provides in pertinent part:

(1) No public utility doing business in Oregon shall, without first obtaining the commission's approval of such transaction:

(a) Sell, lease, assign or otherwise dispose of the whole of the property of such public utility necessary or useful in the performance of its duties to the public or any part thereof of a value in excess of $10,000, or sell, lease, assign or otherwise dispose of any franchise, permit, or right to maintain and operate such public utility or public utility property, or perform any service as a public utility;

approve the sale, lease, assignment or other disposition of public utility property.

After the OPUC issued its 1972 Order, PGE and PP&L stopped competing with each other in Portland. Each utility served customers exclusively in the parcels in which it had acquired the electric distribution facilities of the other.

Columbia Steel operates a steel casting plant located in the area which PGE began serving exclusively after the issuance of the 1972 Order. In 1987, Columbia Steel asked PP&L to service its plant because PP&L's rates were lower than PGE's. PP&L refused, citing the fact that the plant was located in the territory being served exclusively by PGE.

In 1989, Columbia Steel again asked PP&L to service its casting plant. This time, PP&L agreed and offered to enter into a supply contract with Columbia Steel. PGE objected, however, citing its 1972 Agreement with PP&L. PGE took the position that the 1972 Agreement gave it the exclusive right to service Columbia Steel's plant because it was located in the service territory allegedly "allocated" to PGE by the 1972 Agreement. Undeterred, Columbia Steel wrote PGE on May 30, 1990, asking it to "wheel" electricity generated by PP&L to the casting plant until PP&L could build a substation which would enable it to deliver power directly to the plant. PGE refused, reasserting that it had the exclusive right to service Columbia Steel's plant.

On June 19, 1990, Columbia Steel filed this antitrust action against PGE, PP&L, and the OPUC, on the theory that the division of Portland into exclusive service territories violated the

---

(2) Every such sale, lease, assignment, mortgage, disposition, encumbrance, merger or consolidation made other than in accordance with the order of the commission authorizing the same is void.

Or. Rev. Stat. § 757.480.

Sherman Act, 15 U.S.C. §§ 1-2.[7] The defendants raised the state-action doctrine as an affirmative defense, contending that the division of the Portland market was cloaked with antitrust immunity by the 1972 Order of the Oregon OPUC approving the 1972 Agreement.

In July 1990, PP&L entered into a contract with Columbia Steel and began servicing the casting plant in July 1991, when PGE began transmitting PP&L's power to the plant over PGE's power line. Columbia Steel later dismissed all its claims against PP&L, which explains why PP&L is not a party to this appeal.

On July 3, 1991, the district court rejected PGE's state-action defense in an order granting Columbia Steel's motion for partial summary judgment. *Pacificorp v. Portland Gen. Elec. Co.*, 770 F. Supp. 562 (D. Or. 1991). The district court held that the OPUC's 1972 Order did not articulate a state policy to allocate exclusive service territories in Portland as required by *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980). *Pacificorp*, 770 F. Supp. At 569-71. As the district court interpreted the OPUC's 1972 Order, it approved a one-time exchange of property and customer accounts, but not an allocation of exclusive service territories. *Id.* At 570-71.

On February 4, 1993, the district court granted summary judgment for Columbia Steel on the remaining issues, ruling that PGE had violated section 1 of the Sherman Act in agreeing with PP&L not to compete in the Portland market. The court awarded Columbia Steel $508,425 in treble damages and $901,671.62 in attorneys' fees and costs.

---

[7]An agreement among competitors to allocate territories is a per se violation of § 1 of the Sherman Act. *E.g.*, *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49-50 (1990); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 378 (1973) (contracts that purported to restrict defendant's ability to wheel power "were 'in reality, territorial allocation schemes,' " and "were *per se* violations of the Sherman Act") (citation omitted).

II. State-Action Immunity

A. The Midcal Clear Articulation Requirement

The state-action doctrine cloaks anticompetitive conduct with antitrust immunity only if the state's intent to displace competition with regulation is "clearly articulated and affirmatively expressed as state policy." *Midcal,* 445 U.S. at 105 (upholding state wine pricing system because "[t]he legislative policy is forthrightly stated and clear in its purpose to permit resale price maintenance"). The *Midcal* test is a "rigorous" one that "ensure[s] that private parties [can] claim state-action immunity from Sherman Act liability only when their anticompetitive acts [are] truly the product of state regulation." *Patrick v. Burget*, 486 U.S. 94, 100 (1988). It guarantees that the "private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests," *id.* at 101, and limits the spread of an immunity that is "disfavored, much as are repeals [of the antitrust laws] by implication," *FTC v. Ticor Title Ins. Co.,* 504 U.S. 621, 636 (1992), because of Congress's "overarching and fundamental policies" protecting competition, *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 398-99 (1987). *See also* Phillip Areeda & Donald F. Turner, *Antitrust Law* § 214e (1978).

The district court acknowledged that the provisions of chapter 758 of the Oregon Revised Statutes, which authorize the OPUC to approve contracts between public utilities allocating exclusive service territories, "articulate the policy of the State of Oregon to remove market competition as the basis for determining the customers of the providers of electricity." *Pacificorp* 770 F. Supp. At 570. As the district court put it:

> To the extent that a public utility provider obtains a lawful and valid contract for the allocation of territories and customers through the provisions of the territorial allocation statutes, [Or. Rev. Stat.] 758.400 to 758.475,

that provider is immune from antitrust violations.

. . . .

> [Or. Rev. Stat.] 758.400(1) states that "'[a]llocated territory' means an area with boundaries established by a contract between persons furnishing a similar utility service and approved by the commission or established by an order of the commission approving an application for the allocation of territory." In order to lawfully displace competition as the method of allocating customers for electric service in a particular area, utility companies must enter into a contract which allocates service territories and designates service to customers, and the utility companies must make application to an receive an order from the [O]PUC approving and establishing the allocation of these territories. These requirements must be met in order to receive the immunity which is provided by the state statutory scheme from the federal antitrust laws.

Id.

Notwithstanding the clarity with which chapter 758 expresses a legislative policy of authorizing the OPUC to approve allocations of exclusive service territories, the district court rejected PGE's state-action immunity defense because the OPUC failed to exercise that authority in issuing the 1972 Order. *Id.* At 571. The district court explained that the 1972 Agreement between PGE and PP&L, which the 1972 Order approved, did not establish exclusive service territories in the city of Portland. As the district court read the 1972 Agreement, PGE and PP&L had agreed "only to an exchange of facilities within the area relevant to this action." *Id.* at 571. In other words, the state did not approve the displacement of competition with territorial monopolies in the Portland market with the clarity required by *Midcal.*

We agree with the district court that the 1972 Order fails to speak with sufficient clarity to satisfy the *Midcal* test.[8] Neither the 1972 Order nor the 1972 Agreement it approved says anything about exclusive service territories in the city of Portland. This omission becomes glaring when the language of the 1972 Order as it pertained to Portland is compared with the language of the same order as it pertained to the city of Rainier. Although the 1972 Order said nothing about the exclusive service territories in approving the exchange of property in

---

[8]PGE argues that the clear articulation prong of the *Midcal* is satisfied because Or. Rev. Stat. §§ 758.400 - 758.450 "encourage exactly the kind of division that PGE and PP&L carried out," and that whether or not the OPUC clearly authorized PGE's challenged conduct is relevant only to the active supervision prong of *Midcal*, 445 U.S. at 105 (state action immunity only applies if the state actively supervises the challenged anticompetitive conduct). Resp. Of Portland General Elec. Co. To Appellant's Pet. For Reh'g and Amicus Brief of United States, at 18. In making this argument, PGE relies on *Praxair, Inc. v. Florida Power & Light Co.*, 64 F.3d. 609, 612 (11th Cir. 1995) ("If [the defendant engaged in anticompetitive conduct] presumably because of a territorial agreement, but the area in question was never approved by the Commission, the [defendant's] action would not merit state action immunity because of the lack of 'active state supervision.' ") (quoting *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992)), *cert. denied*, 116 S. Ct. 1678 (1996).

Praxair does not help PGE. As the Court explained in *Ticor*, the case on which *Praxair* relies, "*Midcal*'s two elements...[are both] directed at ensuring that particular anticompetitive mechanisms operate because of a deliberate and intended state policy." *Ticor*, 504 U.S. at 636. *Praxair* is nothing more than a fact specific application of the *Midcal* test. The anticompetitive conduct had been authorized by a Florida Public Service Commission order approving an allocation of service territories, and the Eleventh Circuit merely held that the order was intended to include a particular county in the exclusive service territories created. *See Praxair*, 64 F.3d at 613. Since the Oregon statute speaks solely of authorizing the OPUC to approve exclusive service territories, the state's clearly articulated policy is to have the OPUC decide whether to sanction anticompetitive conduct. It follows, therefore, that we must look to the decisions of the OPUC to determine whether PGE's conduct was part of a clearly articulated state policy. *Cf. Ticor*, 504 U.S. at 636-37 (first prong of *Midcal* test intended to ensure state has not acted through inadvertence).

Portland, it expressly used such language in approving a provision of the 1972 Agreement which transferred to PGE an area within the city of Rainier that had previously been served exclusively by PP&L. See 1972 Order at 8 ("ORDERED that the application of [PP&L] to transfer certain of its *exclusively served area allocated to it and lying in and around Rainier, Oregon*, to [PGE] is approved.") (emphasis added). The contrast between the "transfer and exchanging of utility property and facilities and customers" language used in the 1972 Order to describe the utilities' agreement with respect to the city of Portland, 1972 Order at 8, and the "exclusively served territory" language used in the 1972 Order to describe the utilities' agreement with respect to the Rainier area, *id.*, is striking.

Like the part of the 1972 Order relating to Rainier, the ordinance passed by the Portland City Council earlier in 1972 also referred to exclusive service territories. It did so, however, in disapproving, not approving, the elimination of competition in favor of a territorial division between PGE and PP&L. The ordinance reminded the utilities that they "operate under non-exclusive franchises and that the obligation to supply properties within the City must remain binding upon both companies." Portland, Or., Ordinance 134416 (1972).

Our second reason for agreeing with the district court is that in approving the exchange of property in Portland, the 1972 Order does not cite any of the statutory provisions governing the allocation of exclusive service territories. Rather than citing chapter 758 or any of its provisions, the OPUC cited a provision of chapter 757, the chapter governing "Utility Regulation Generally," specifically Or. Rev. Stat. § 757.480, which authorizes the approval of exchanges of utility facilities. We are struck by the precision and care with which the OPUC cited various statutory provisions in issuing the 1972 Order. As authority for approving the transfer to PGE of the exclusively served territory in Rainier previously allocated to PP&L, the OPUC cited the statutory provision governing transfers of

previously allocated service territories (Or. Rev. Stat. § 758.460[9]). It did not cite any section of chapter 758 in approving the provisions of the 1972 Agreement relating to Portland.[10] As authority for approving the exchange of facilities in Portland, the OPUC cited only the statutory provision governing transfers of utility facilities (Or. Rev. Stat. § 757.480).

In sum, the OPUC did not "forthrightly state[ ]" a policy of the state of Oregon that was "clear in its purpose" to displace competition in the Portland market with territorial monopolies.[11] *Midcal*, 445 U.S. at 105.

The OPUC argues that, despite the failure of the 1972 Order to say anything about exclusive service territories in the city of Portland, the Order nonetheless immunized the division of the

---

[9]Section 758.460 provides in relevant part:

(1) The rights acquired by an allocation of territory may only be assigned or transferred with the approval of the commission after a finding that such assignment or transfer is not contrary to the public interest. Or. Rev. Stat. § 758.460.

[10]In particular, there is no reference in the 1972 Order to Or. Rev. Stat. § 758.410, which permits utilities to contract with each other "for the purpose of allocating territories and customers between the parties." Nor is there any reference to § 758.425, which gives the OPUC its authority to approve such contracts, even though an exclusive service territory can be established only "by a contract between persons furnishing a similar utility service and approved by the commission or ... by an order of the commission approving an application for the allocation of territory." Or. Rev. Stat. § 758.400(1) (defining "allocated territory").

[11]Columbia Steel argues that PGE and PP&L intentionally introduced ambiguity into the 1972 Agreement in order to slip a monopolistic agreement past the city of Portland. We need not address this argument because, whether or not ambiguity was introduced into the contract for the self-serving purpose of making it less politically vulnerable, the utilities' failure to include the "exclusively served" language in the 1972 Agreement that had been included in the plan submitted to the city Council certainly had the *effect* of creating ambiguity in the 1972 Order.

Portland market because the "statutory import of the 1972 Order was necessarily an allocation of service territory in the City of Portland as between PGE and PP&L." Opening Brief of Pub. Util. Comm'n of Or. at 9. The OPUC asserts that the 1972 Agreement "effectively" allocated exclusive service territories because "[e]xchanging customers is logically the only way to reallocate established service territory into exclusive zones." *Id.* At 9-10. The OPUC adds that "[t]he only way that the OPUC could lawfully have approved the transfer of customers between existing utilities was under the authority of the territorial allocation statutes." *Id.* at 10. *See also* Resp. Of Portland General Elec. Co. To Appellant's Pet. For Reh'g and Amicus Brief of United States, at 7 ("The allocation statutes speak of the allocation of 'territories and *customers*.' The 1972 Agreement and the 1972 Order explicitly allocate *customers*, whether they explicitly allocate territories or not.") (citation omitted) (emphasis in original).

In response, Columbia Steel argues that nothing in the relevant statutory provisions rules out a one-time exchange of customers as an incident of an exchange of facilities without the establishment of permanent territorial monopolies. According to Columbia Steel, such a one-time exchange of customers is a practical consequence of an exchange of facilities:

> When, as in this case, a utility sells the power line that distributes electricity directly to a customer, it makes sense that the account of the customer served by that line would be transferred to the new owner of the line. Thus, the transfer of customer accounts was only an incident of the transfer of utility property. It is the practical consequence of a transfer of facilities, but it is not the perpetual grant of monopoly power. As a practical matter, unless another source of electricity is available, the customer will take service from the utility that owns the facilities connected to that customer's premises. But the utility serves that customer because it is practical to do

> so, not because the utility has an exclusive right to serve that customer.

Pet. for Reh'g, at 13-14.

Columbia Steel's argument has considerable force. It is buttressed by the fact that PP&L was able to take a good customer away from PGE simply by building a substation in PGE's "territory" to transmit power to Columbia Steel's plant at rates that were more competitive than PGE's. Thus, although the transfer of facilities, and the transfer of customers incidental thereto, gave each utility a temporary competitive advantage, it did not immunize them from competition forevermore. That PGE's advantage proved to be transitory is not surprising given the competitive pressures that technology and deregulation have been exerting on utility markets where monopolies have traditionally reigned.

In any case, we need not resolve the dispute over whether, as the OPUC argues, an exchange of customer accounts is, as a practical matter, the factual equivalent of an allocation of exclusive service territories. Even if this were the case, it would merely be evidence that might tend to support a permissive inference that the OPUC intended to approve a displacement of competition in Portland with monopolies, and any such inference could not transform the 1972 Order into the forthright and clear statement that it takes to satisfy *Midcal's* stringent requirements.

PGE and the OPUC also argue that the OPUC's failure to cite any provision of chapter 758 as authority for the 1972 Order as it pertains to Portland renders the 1972 Order nothing more than an "imperfect regulation" which may still confer state-action immunity, citing *Llewellyn v. Crothers*, 765 F.2d 769, 774 (9th Cir. 1985) ("actions otherwise immune should not forfeit that protection merely because the state's attempted exercise of its power is imperfect in execution under its own law").

PGE and the OPUC's reliance on *Llewellyn* is misplaced. In *Llewellyn*, the administrator of a state agency promulgated a fee schedule for health care providers, as he was authorized to do under state statute, but bypassed statutory rulemaking procedures. We held that although the administrator had acted in a "procedurally improper manner,"the state government was nonetheless entitled to state-action immunity. *Id.* at 773. *Llewellyn* is inapposite here. There the state legislature had clearly articulated an intention to authorize the administrator to promulgate a fee schedule, and the administrator had exercised that authority in clearly articulating his intent to adopt such a feed schedule, notwithstanding that he did not follow the required rulemaking procedures of the state's Administrative Procedure Act. *Id.* At 772. In contrast, the OPUC did not clearly exercise its statutory authority to approve the allocation of exclusive service territories in Portland; indeed, it did not speak to the issue at all. So rather than exercising its authority "imperfectly," the OPUC failed altogether to exercise its authority to approve exclusive service territories with any clarity whatsoever.

Finally, PGE and the OPUC argue that even if the 1972 Order did not clearly authorize an allocation of exclusive service territories within the city of Portland, later orders issued by the OPUC clarify the 1972 Order. In particular, the PGE and the OPUC rely upon a 1974 Order of the OPUC, which, they assert, confirmed that the 1972 Order did, in fact, confer state-action immunity.[12]

None of the OPUC orders relied on by PGE establishes state-action immunity. First, to the extent that there is language in the orders relevant to the division of the Portland market, it merely recognizes the undisputed fact that PGE and PP&L had

---

[12]PGE also cites Pub. Util. Comm'n of Or., Orders 73-688 (Oct. 25, 1973), 75-704 (Aug. 13, 1975), and 79-055 (Jan. 12, 1979).

stopped competing with each other in that city.[13] For instance, the 1974 Order, on which PGE relies most heavily, states that PGE and PP&L "no longer competitively serve the same areas. Their respective areas of service within Portland have been defined." Pub. Util. Comm'n of Or., Order 74-658 (Sept. 3, 1974), *aff' d sub nom. American Can Co. v. Davis*, 559 P.2d 898 (1976) (the "1974 Order"), at 25; *see also* Pub. Util. Comm'n of Or., Order 75-704 (Aug. 13, 1975) (noting that PP&L serves customers "in parts of Portland"). That language is merely a description of the status quo; it is not an expression of a state policy to replace competition with regulation. Although the quoted language might tend to support a permissive inference that the commissioners in 1974 thought that the commissioners in 1972 had defined exclusive service territories in Portland when they issued the 1972 Order, the OPUC can not confer state-action immunity by forming an intent that is not expressed forthrightly and clearly.

Second, the "respective areas of service" language in the 1974 Order, as well as the language in the other OPUC orders stating that PGE and PP&L had stopped competing in Portland, cannot be construed as a product of the OPUC's exercise of its statutory authority to approve contracts allocating exclusive service territories. Because there were no such contracts before the OPUC when it issued these later orders, the orders were not issued pursuant to the provisions of Or. Rev. Stat. Ch. 758 authorizing approval of such contracts. The 1974 Order, for example, was issued pursuant to Or. Rev. Stat. §§ 757.205, 757.210, and 757.215, which pertain to changes in tariffs charged by utilities. The 1974 Order approved PP&L's revised tariff schedule, which equalized PP&L's rates in Portland with the higher rates it charged in other areas of the state. As a result, PP&L's rates for customers in Portland became higher

---

[13]As Columbia Steel puts it, "[w]hether, as a matter of fact, the utilities competed is an entirely different inquiry from whether, as a matter of law, the utilities secured lawful allocations of exclusive service territory." Columbia Steel Reply Brief at 11.

than the rates charged by PGE. The "respective areas of service" language in the 1974 Order was recited merely to establish a rationale for the OPUC's action approving the new rates:

> A rate differential between Portland and [other areas] was formerly justified on the basis of competing electric service in Portland between [PP&L] and [PGE]. For various reasons, it was believed that in the Portland metropolitan area rates between two similar utilities serving the same area should be the same.
>
> The two companies no longer competitively serve the same areas. Their respective areas of service within Portland have been defined. Thus, with the lack of competition, the justification for rate uniformity is said to have disappeared.

1974 Order, at 25.

As a matter of law, then, neither the 1974 Order nor any of the other subsequent orders of the OPUC amend the 1972 Order to clarify that Order as an expression of state policy to displace competition with regulation. At best, these orders recite that the utilities have stopped competing with each other within territories they have defined. As our court has said, mere "state authorization, approval, encouragement, or participation in restrictive private conduct confers no antitrust immunity." *Phonetele, Inc. v. American Tel. & Tel. Co.*, 664 F.2d 716, 736 (9th Cir. 1981) (quoting *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 592-93 (1976)), *cert. denied*, 459 U.S. 1145 (1983).

In sum, we agree with the district court that the elimination of competition between PGE and PP&L in Portland was not cloaked with state-action immunity. As the district court put it, the OPUC did not "specifically and clearly authorize[ ] by the relevant statutory process" a division of the Portland market into exclusively served territories. *Pacificorp*, 770 F. Supp. at 571.

B. Issue Preclusion

After Columbia Steel filed this antitrust action in federal district court, PGE applied to the OPUC for a declaration that the 1972 Order allocated exclusive service territories in Portland. In response, the 1992 OPUC issued an order declaring that the 1972 OPUC had intended to do so, and amended the 1972 Order, *nunc pro tunc,* to that effect. In its 1992 Order, the OPUC acknowledged that "perhaps [the 1972 Order] did not unambiguously allocate exclusive service territories to PGE and PP&L." Pub. Util. Comm'n of Or., Order 92-557 (Apr. 16, 1992) (the "1992 Order"), at 14.[14]

Armed with the OPUC's 1992 Order, PGE moved for reconsideration of the district court's summary judgment rulings in favor of Columbia Steel, arguing that the OPUC's 1992

---

[14]The 1992 Order states, in relevant part:

> [B]cause [the 1972 Order] did not expressly refer to ORS Chapter 758 with respect to future service in Portland under the allocation statutes and because the order did not say that exclusive territorial allocations are being created in Portland, . . . perhaps it did not unambiguously allocate exclusive service territories to PGE and PP&L. However, the order did create boundaries that the utilities observed as if they were allocated territories until Columbia Steel's attempt to switch utilities in 1989. The Commission made the required statutory findings to allocate exclusive service territories and acted as if it had approved a territorial allocation in its 1972 order. The behavior of the utilities and the Commission demonstrates an understanding that exclusive service territories had been created.
>
> For the foregoing reasons, it appears to the Commission that [the 1972 Order] is not a complete and accurate memorial of the 1972 decision of the Commissioner . . . : the order omits a reference to the statute under which its findings were actually made when the Commissioner approve the PGE/PP&L contract. Pursuant to ORS 756.568, the Commission will amend [the 1972 Order] nunc pro tunc, to conform to the actual decision intended and followed.

1992 Order at 14-15.

Order was entitled to full faith and credit. The district court denied the motion, reasoning that:

> [t]he availability of the defense of state action immunity depends upon the satisfaction of the objective standards set forth in *Parker* [*v. Brown*, 317 U.S. 341 (1943)] and the authorities which have interpreted *Parker* . . . . The fact that the [O]PUC did not do what it now concludes that it intended to do in the 1972 Order does not alter the fact that the claim of PGE to a monopoly was not specifically and clearly authorized at the time that this court decided that Columbia Steel was entitled to a declaration that [the 1972 Order] neither empowers nor authorizes PGE to monopolize the service of electric power to Columbia Steel.

Unpublished Opinion, filed June 29, 1992, at 7-9.

We agree and hold that the 1992 Order is not entitled to preclusive effect because the issue decided by the OPUC in that order is not identical to the state-action immunity issue.[15] The issue decided by the 1992 OPUC is whether the 1972 OPUC

---

[15]Oregon law provides that one tribunal may give preclusive effect to the prior determination of an issue by another tribunal only if "the issue in the two proceedings is identical." *Hickey v. Settlemier*, 864 P.2d 372, 375 (Or. 1993).

Oregon law also provides that the second tribunal may give preclusive effect to an earlier decision only if "the party sought to be precluded has had a full and fair opportunity to be heard on that issue." *Id.* Columbia Steel argues that it was not given such an opportunity before the OPUC issued the 1992 Order. Columbia Steel denies having waived its right to a hearing on the merits, pointing to record evidence that it only agreed to postpone the submission of evidence to the OPUC until the OPUC ruled on Columbia Steel's motion to dismiss for lack of jurisdiction. We need not decide whether Columbia Steel was denied a fair opportunity to be heard in the proceeding before the OPUC because, as we explain in the text, the issue in that procedure is not "identical" to the issue of state-action immunity in this federal antitrust action. *Id.*

had the intent to approve the allocation of exclusive service territories in the city of Portland. The state-action immunity issue is different. It does not turn on the fact issue of the subjective intent of the OPUC at the time it issued the 1972 Order. Rather, the state-action immunity question is one of law that turns on whether the displacement of competition with monopolies in the Portland market was "clearly articulated and affirmatively expressed as state policy," *Midcal*, 445 U.S. at 105. As the district court said, "the availability of the defense of state-action immunity depends upon the satisfaction of the objective standards set forth in *Parker* [and its progeny]." Unpublished Opinion, filed June 29, 1992, at 7-8. In other words, state-action immunity is a question of federal antitrust law that turns on the clarity of a state's expression of its policy, not the subjective intent of its policymakers.

In declaring what the 1972 OPUC intended to do, the 1992 OPUC approached the 1972 Order as though it were interpreting a contract. After finding ambiguity in the 1972 Order, the 1992 OPUC went on to decide, as an issue of fact, the intent of the 1972 OPUC by looking to extrinsic evidence such as the behavior of the parties between 1972 and 1990. *See* 1992 Order, at 12-15. To repeat, state-action immunity is not an issue of fact. It cannot be decided simply by ferreting out extrinsic evidence in an effort to ascertain the subjective intent of the state. The issue of state-action immunity must be decided by applying the "rigorous" test, *Patrick*, 486 U.S. at 100, of whether the state "clearly articulated and affirmatively expressed" its intent to displace competition with regulation as a matter of state policy. *Midcal* 445 U.S. at 105.[16]

---

[16]For the same reason, there can be no issue preclusion based on the judgment of the Marion County Court affirming the 1992 Order on the ground that the it was "supported by substantial evidence." *See Columbia Steel Casting Co. V. Public Util. Comm'n of Or.*, Marion County Circuit Court No. 92C-12005, Judgment affirming Public Utility Commission of Oregon Order Nos. 92-557 & 92-1135, at 2, *aff' d without opinion*, Oregon Ct. Of Appeals (Dec. 15, 1993).

In sum, the 1992 OPUC could not satisfy the *Midcal* test retroactively by amending the 1972 Order years after PGE entered into the monopolistic agreement it now seeks to cloak with federal antitrust immunity.[17] In other words, the state of Oregon cannot satisfy the objective *Midcal* clear articulation test by declaring that it had intended to displace competition with regulation 20 years earlier.[18]

C. Foreseeability: PGE's New Argument on Appeal

PGE, joined by the OPUC, argues for the first time on appeal that state-action immunity applies because the division of the Portland market was a foreseeable result of the 1972 Order. According to PGE, "state action immunity must apply where the [challenged] conduct is the 'foreseeable result' of the state's policy." Opening Brief of Appellant Portland General Elec. Co. At 23 (citing *Nugget Hydroelectric Co. v. Pacific Gas & Elec. Co.*, 981 F.2d 429 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2336 (1993)). "We will review an issue that has been raised for

---

[17]It is fundamental that an order or judgment is not entitled to full faith and credit if the issuing tribunal had no subject matter jurisdiction over the matter before it. *Underwriters Nat'l Assurance Co. V. North Carolina Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 692, 704-05 (1982). We do not know whether the OPUC and the Marion County Court had subject matter jurisdiction as a matter of state law to amend the 1972 Order retroactively. We believe, however, that it is questionable whether either had subject matter jurisdiction to decide the federal antitrust question of state-action immunity that is now before us. We need not decide this jurisdictional question because the lack of identity between the issue decided in the 1992 Order and the issue of state-action immunity deprives the 1992 Order of any preclusive effect in this federal antitrust action.

[18]PGE's reliance on *California Aviation, Inc. V. City of Santa Monica*, 806 F.2d 905 (9th Cir. 1986), and the cases on which it relies, for the proposition that *Midcal* can be satisfied retroactively is misplaced. In *California Aviation*, the later statute "articulate[d] and affirm[ed] a *pre-existing state policy* of allowing [particular anticompetitive conduct]." *Id.* At 909 (emphasis added). In contrast, there was no pre-existing state policy to eliminate competition in the Portland market for the OPUC to articulate or affirm in its 1992 Order.

the first time on appeal under certain narrow circumstances," including "when the issue is purely one of law." *Parks Sch. Of Business v. Symington*, 51 F.3d 1480, 1488 (9th Cir. 1995). Because the foreseeability issue raised by PGE and the OPUC is a pure issue of law, and because consideration of it will not prejudice Columbia Steel, *see Aronson v. Resolution Trust Corp.*, 38 F.3d 1110, 1114 (9th Cir. 1994), we exercise our discretion to consider it.

In our original opinion, we agreed with PGE. We held that "[u]nder [*Nugget* and *Medic Air Corp. v. Air Ambulance Auth.*, 843 F.2d 1187 (9th Cir. 1988)], private conduct is immunized if it is a foreseeable result of state agency action and if circumstances justify an inference that the agency intended to authorize the conduct," *Columbia Steel Casting Co. v. Portland General Elec. Co.*, 60 F.3d 1390, 1396 (9th Cir. 1995), *herewith withdrawn*. Although we said that "the 1972 Order is not particularly clear regarding the [O]PUC's intention to permit a permanent division of the Portland market, as opposed to a one-time exchange of facilities and customer accounts," *id.* At 1396, we nonetheless "conclude[d] that the elimination of competition between PGE and PP&L was a natural and foreseeable result of the 1972 Order," *id.* at 1399, "justify[ing] the inference that it was intended by the [OPUC]." *Id.* Accordingly, we held that PGE's conduct enjoyed state-action immunity from Sherman Act liability.

We are persuaded by Columbia Steel's petition for rehearing and an amicus curiae brief filed by the Antitrust Division of the Department of Justice that we erred in allowing a foreseeability test to be substituted for the clear articulation test of *Midcal*. In doing so, we misconstrued *Medic Air* and *Nugget*. In *Medic Air*, we used *Midcal's* clear articulation test, not a foreseeability test to be substituted for the clear articulation test, in deciding that state-action immunity shielded a monopoly granted to Air Ambulance Authority in the market of dispatching air ambulances in Washoe County, Nevada. 843 F.2d at 1189. We did use a foreseeability test in *Medic Air*, but only in

deciding the reach of the antitrust immunity that protected Air Ambulance Authority's monopoly in the dispatching market. Specifically, we held that Air Ambulance Authority was not shielded from antitrust liability in using its immunized monopoly power to gain a competitive advantage in a different market, the market for air ambulance services. *Id.* We reasoned that Air Ambulance Authority's antitrust immunity in the dispatching market did not extend to the ambulance service market because anticompetitive conduct in the service market was "not a 'necessary or reasonable consequence' of the decision to establish an exclusive dispatcher." *Id.* (Citation omitted). As we explained, "[t]he state and its agencies have not granted Air Ambulance an exclusive [ambulance service] franchise. That they might have done so is irrelevant. The state must act if immunity is to exist . . . The Protocols [governing dispatching procedures] did not interfere with existing competition. The District Board did not seek to displace competition or limit entry in to the ambulance market. The District Board did not even consider the dispatch program's effect upon competition." *Id.*

The anticompetitive conduct at issue in *Nugget* was also expressly authorized by state action independently of any foreseeability inquiry. A California statute authorized the California Public Utility Commission to "'specify the prices, terms and condition' for the sale of power by a private power producer like Nugget to a utility." 981 F.2d at 434 (quoting statute). In exercising that statutory authority, the California PUC clearly expressed an intention to regulate such sales in detail. The California PUC's implementing Guidelines provided that private power producers would "generally bear the risk of failing to develop their power facility before the five year deadline and that only rarely will permitting delays qualify as *force majeur* events." *Id.* The Guidelines specified that a utility was "'expect[ed] . . . [to] negotiate [*force majeur* claims] only in instances where it is convinced that a settlement, versus adjudication, is in the rate payers' best interest.'" *Id.* (Quoting Guidelines). We held in *Nugget* that state-action immunity extended to the anticompetitive effects of a utility's rejection of

a private power supplier's *force majeur* claim for an extension of the contract period because the anti-competitive effects were a foreseeable result of the California PUC's implementing Guidelines. *Id.*

Our rejection of PGE's argument that it is entitled to state-action immunity because the division of the Portland market was a foreseeable result of the 1972 Order is consistent with *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), upon which we relied in *Nugget*. The issue in *Town of Hallie* was whether the city's anticompetitive activities were protected by state-action immunity "when the activities are *authorized*, but not compelled, by the State." *Id.* at 36 (emphasis added). The Supreme Court held that the challenged action of the city was protected by the state-action immunity doctrine because the city's conduct was "a foreseeable result of empowering the City to refuse to serve unannexed areas." *Id.* At 42. However, the Court held that this result was foreseeable because the state expressly authorized the city's anticompetitive behavior. *See id.* In a contrast, the OPUC did not expressly authorize PGE to maintain exclusive service territory; it merely approved the exchange of property and customers.

In sum, neither *Medic Air* nor *Nugget* applies a foreseeability test as a substitute for the threshold *Midcal* clear articulation test. As the Antitrust Division puts it, "express authorization [is] the necessary predicate for the Supreme Court's foreseeability test." Brief of Amicus Curiae United States, at 9. PGE cites no case to the contrary and we know of none.

III. PGE's Other Defenses

In the absence of state-action immunity, an agreement between PGE and PP&L to divide the Portland market for electricity constitutes a per se violation of § 1 of the Sherman Act. *See, e.g., Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49-50 (1990) (agreement among competitors to allocate territories to diminish competition is a per se § 1 violation).

There is no genuine issue of material fact regarding the existence of such an agreement that would prevent the entry of summary judgment against PGE on liability. *See Abdul-Jabbar v. General Motors Corp.*, 85 F.3d 407, 410 (9th Cir. 1996). We therefore address PGE's affirmative defenses other than state-action immunity. Although the district court found only one of these defenses worthy of discussion, we discuss each of them in turn.

A. Statute of Limitations

PGE argues that Columbia Steel's antitrust action, which was filed on June 19, 1990, is time-barred because it was filed four years after any overt act in furtherance of PGE and PP&L's agreement to divide the Portland market. *See* 15 U.S.C. § 15(b) (establishing 4-year limitations period for Sherman Act violation); *Pace Indus., Inc. v. Three Phoenix Co.*, 813 F.2d 234, 237 (9th Cir. 1987) ("even when a plaintiff alleges a continuing violation, an overt act by the defendant is required to restart the statute of limitations and the statute runs from the last over act"). PGE argues that the acts relied upon by the district court in finding Columbia Steel's antitrust claims timely were insufficient to restart the running of the statute because they were merely "reaffirmations" of the original 1972 Agreement to divide the Portland market. *See id.* at 238.

On May 30, 1990, Columbia Steel wrote to PGE and stated that it would terminate its contract with PGE and take power from PP&L as of July 1, 1990, if PGE would agree to wheel power for PP&L so it could serve Columbia Steel's casting plant. PGE said no, declaring in a letter dated May 30, 1990, the "[Columbia Steel] is within PGE's exclusive territory. If it desires to purchase electricity, it must do so from PGE." The district court held that PGE's refusal to wheel PP&L's electricity to Columbia Steel's casting plant was an overt act that restarted the statute of limitations.

We agree with the district court. PGE's refusal was not a mere reaffirmation of PGE and PP&L's 1972 Agreement to stop competing in the Portland market because the 1972 Agreement was not a permanent and final decision that controlled the later act. *Hennegan v. Pacifico Creative Serv., Inc.*, 787 F.2d 1299, 1300-01 (9th Cir.) (limitations period restarted each time tour guides shepherded tourists away from plaintiff's souvenir shop in furtherance of antitrust conspiracy between tour operators and other vendors) (quoting and distinguishing *In re Multidistrict Vehicle Air Pollution*, 591 F.2d 68, 72 (9th Cir.), *cert. denied*, 444 U.S. 900 (1979), in which later acts were mere affirmation of earlier " 'irrevocable, immutable, permanent and final' decisions" that "completely and permanently excluded [plaintiff] from the market"), *cert. denied*, 479 U.S. 886 (1986).[19] *Hennegan* also distinguishes *David Orgell, Inc. v. Geary's Stores, Inc.*, 640 F.2d 936 (9th Cir.), *cert. denied*, 454 U.W. 816 (1981), the only Ninth Circuit case other than *Multidistrict Air Pollution* that is cited by PGE on the statute of limitation issue, on the same ground. *Hennegan*, 787 F.2d at 1301-02.

B. Justification defenses

PGE asserts that the 1972 Order required it to stop competing with PP&L in the city of Portland, and that "had PGE failed to conform to the commands of the OPUC . . . it could have subjected itself to treble damages for violation of Oregon utility law." Opening Brief of Appellant Portland Gen. Elec. Co., at 29. PGE argues that as a result it is entitled to raise a regulatory justification defense, *see Phonetele, Inc. v. American Tel. & Tel. Co.*, 664 F.2d 716, 737-38 (9th Cir.

---

[19]Columbia Steel also argues that the refusal in 1987 of PGE's coconspirator PP&L to service the steel casting plant over the objection of PGE was also an overt act that restarted the statute of limitations. We need not consider the significance of the events in 1987 to the statute of limitations question because we hold that the statutory period was restarted in 1990. The 1987 events are, however, relevant to Columbia Steel's cross-appeal regarding damages, which we address in Part V, *infra*.

1981) (no antitrust liability when defendant reasonably concludes that its actions are *necessitated* by the concrete factual imperatives recognized as legitimate by the regulatory authority), *cert. Denied*, 459 U.S. 1145 (1983), and a business justification defense, *see, e.g., City of Anaheim v. Southern Cal. Edison*, 955 F.2d 1373, 1381 (9th Cir. 1992) (utility not liable for using high-powered transmission line to the exclusion of competitors in order to keep rates low).

These justification defenses are not available to PGE. When it stopped competing with PP&L in Portland after the 1972 Order issued, it was under no compulsion to do so because the 1972 Order did not approve the allocation of exclusive service territories. Had the 1972 Order done so, a justification defense would arguably have been available to PGE because the Oregon statutes provide that only the utility that has been allocated a territory may serve that territory. *See* Or. Rev. Stat. § 758. 450(2) ("Except [under circumstances not relevant here], no other person shall offer, construct or extend utility service in or into an allocated territory."). In light of this provision, it is significant that in approving an exchange of facilities, the 1972 Order used *permissive* language. *See* 1972 Order at 8-9 ("ORDERED that [PP&L] *may* transfer to [PGE] all electric distribution plant . . . that [PGE] *may* transfer to [PP&L] all electric distribution plant . . . that the manner and method for accomplishing the transfer and exchange of property . . . and the terms and conditions governing this transfer, shall be as provided by [the 1972 Agreement]") (emphasis added). Because the language of 1972 Order was permissive, it did not require PGE and PP&L to perform the 1972 Agreement and did not prevent them from rescinding it before the property was exchanged. Given the statutory prohibition against serving a territory allocated to another utility, *see* Or. Rev. Stat. § 758,450(2), the permissive language in the 1972 Order would have been incongruous if the 1972 Order had approved an allocation of exclusive service territories.

C. The Noerr-Pennington Doctrine

PGE argues that it is entitled to antitrust immunity under the *Noerr-Pennington* doctrine. *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136 (1961) (the Sherman Act does not prohibit competitors from "associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restrain or a monopoly"); *United Mine Workers of America v. Pennington*, 381 U.S. 657, 670 (1965). The *Noerr-Pennington* doctrine, which is rooted in the First Amendment protection of political activity, *see Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 707 (1962), does not apply here. Applying to an administrative agency for approval of an anticompetitive contract is not lobbying activity within the meaning of the *Noerr-Pennington* doctrine. In any case, PGE is not being held liable for filing the application that resulted in the 1972 Order. PGE is being held liable for agreeing with PP&L to replace competition with area monopolies in the Portland market.

D. The Filed Rate Doctrine

PGE argues that the filed rate doctrine bars Columbia Steel from recovering damages even if PGE did violate the Sherman Act. The filed rate doctrine generally forbids the recovery of treble damages under the Sherman Act based on the payment of rates that are established by regulated tariffs, even if the defendants engaged in illegal price-fixing. *See, e.g., Keogh v. Chicago & Northwestern Ry.*, 260 U.S. 156, 162 (1922). According to PGE, the filed rate doctrine applies in this case as follows: (1) Because PGE could charge only the rates approved by the OPUC, it could not charge the same rate offered by PP&L to Columbia Steel; (2) PGE could not "transfer" its customer Columbia Steel to PP&L without OPUC approval; (3) thus, the district court could not award damages based on the difference between the rate charged by PGE and the "rate that

might have been approved absent the conduct at issue." Opening Brief of Appellant Portland General Electric Co. at 32.

We reject PGE's reasoning. The conduct challenged in this case is not PGE's refusal to sell electricity to Columbia Steel at a lower rate. Rather, the challenged conduct is the non-competition agreement that prevented Columbia Steel from buying electricity at PP&L's lower rates. The filed rate doctrine is inapplicable. To hold that it is applicable would be to "allow a blockade of a competitor to escape scrutiny. This would overextend *Keogh's* reach and could produce a rule that one who pays for services governed by [a regulatory body's] tariffs is foreclosed from asserting that antitrust violations prevented use of a less expensive, equivalent service." *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1159 (3d Cir. 1993).

IV. Damages

PGE argues that Columbia Steel suffered no damages at anytime because (1) at all relevant times, Columbia Steel was obligated on its requirements contract with PGE to purchase electricity from PGE, and (2) PGE could not transfer Columbia Steel as a customer to PP&L without prior OPUC approval. These arguments are to no avail. First, Columbia Steel's requirements contract with PGE did not bar it from suing PGE under the Sherman Act for agreeing with PP&L to stop competing in the Portland market. *See, e.g. Perma Life Mufflers v. International Parts Corp.*, 392 U.S. 134, 139-40 (1968) (franchise agreement does not defeat franchisee's standing to bring antitrust suit against franchiser); *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 377 F.2d 776, 781 (3d Cir. 1967) ("captive customer" having valid lease agreement with defendant for use of certain equipment could nonetheless sue for antitrust violation based on defendant's refusal to sell the equipment), *aff' d on other grounds,* 392 U.S. 481 (1968).

As for PGE's second argument, the only authority it cites is the 1972 Order stating that '[t]here can be no question that the Commissioner has regulatory approval over any such transfers or exchanges of customers," 1972 Order at 6. However, when read in context, this statement refers only to the joint application by PGE and PP&L for the transfer of tens of thousands of customers *without the customers' permission*. It has no application, therefore, to Columbia Steel's request to be transferred, as a customer, from PGE to PP&L. In the absence of any further analysis or authority for PGE's argument that OPUC approval was necessary for Columbia Steel to become a customer of PP&L, we cannot hold that it has any merit.

V. Columbia Steel's Cross-Appeal on Damages

Columbia Steel argued to the district court, and now argues on its cross-appeal, that it was entitled to damages beginning with PP&L's refusal in 1987 to sell Columbia Steel power at its lower rates. The district court rejected this argument, stating that "Columbia Steel cannot recover damages from PGE for actions taken or not taken by PP&L. Even where officials of PP&L contacted officials of PGE and discussed the request for service, the refusal of service was an act by PP&L and not an act by PGE." Unpublished Opinion, filed Feb. 5, 1993, at 24. The district court therefore limited recovery of damages to the period from July 1990, when Columbia Steel entered into a contract with PP&L and was thus "willing and able to actually purchase power at a lower rate from PP&L," and July 1991, when PGE began wheeling PP&L's power to Columbia Steel over PGE's transmission lines. *Id.* at 25.

We agree with Columbia Steel that the district court erred in not awarding damages beginning in 1987. The district court mistakenly held that PGE could not be liable for PP&L's refusal to sell power to Columbia Steel in 1987. PP&L was a coconspirator in 1987, and PGE is liable for the acts of PP&L in furtherance of their conspiracy not to compete in Portland. *See Beltz Travel Serv., Inc. v. International Air Transport*

Ass'n, 620 F.2d 1360, 1367 (9th Cir. 1980) ("If [plaintiff] can establish the existence of a conspiracy in violation of the antitrust laws and that [defendants] were a part of such a conspiracy, [defendants] will be liable for the acts of all members of the conspiracy in furtherance of the conspiracy, regardless of the nature of [defendants'] own actions.").

VI. Conclusion

The partial summary judgment holding PGE liable to Columbia Steel under § 1 of the Sherman Act is **AFFIRMED**. The partial summary judgment awarding Columbia Steel $508,425 in treble damages is **VACATED** and the case is remanded to the district court for a redetermination of Columbia Steel's damages in accordance with this opinion. Columbia Steel's motion for attorney's fees on appeal pursuant to 15 U.S.C. § 15 is **GRANTED**. The amount of the fees shall be determined by the district. court.

APPENDIX B

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

COLUMBIA STEEL CASTING CO., INC., an Oregon corporation, Plaintiff-Appellee, v. PORTLAND GENERAL ELECTRIC COMPANY, an Oregon corporation; Defendant-Appellant	No. 93-35902 D.C. No. CV-90-00592-HJF
COLUMBIA STEEL CASTING CO., INC., an Oregon corporation, Plaintiff-Appellant, v. PORTLAND GENERAL ELECTRIC COMPANY, an Oregon corporation; Public Utility Commission of the State of Oregon, Defendants-Appellees.	No. 93-35958 D.C. No. CV-90-00524-HJF ORDER AND AMENDED OPINION

Appeals from the United States District Court
for the District of Oregon
Helen J. Frye, District Judge, presiding

Argued and Submitted
May 3, 1995 - Portland, Oregon

Filed July 20, 1995

Before: James R. Browning, Thomas M. Reavley*,
and William A. Norris, Circuit Judges.

Opinion by Judge Norris

ORDER

The Petition for Rehearing, filed August 3, 1995, is hereby GRANTED.

The Opinion filed July 20, 1995, and reported at 60 F.3d 1390, 1396 (9th Cir. 1995), is WITHDRAWN and the attached Opinion is ordered filed instead.

OPINION

NORRIS, Circuit Judge:

[This Opinion was identical to the subsequent Opinion (App. A), except in the following particulars:

1) Footnote 8 was expanded in the subsequent opinion. See App. A-15, n. 8;
2) The following paragraph was replaced in the subsequent opinion by the first paragraph on

---

* The Honorable Thomas M. Reavley, Circuit Judge, United States Court of Appeals for the Fifth Circuit, sitting by designation.

A-35.]

"As for PGE's second argument, the only authority it cites is an unexplained statement by the district court that "PGE must receive prior approval from the OPUC before it can transfer a customer to another provider of electric services." Unpublished Opinion, filed Feb. 5, 1993, at 8. Not only is the statement unexplained,[20] the district court cited no statute, regulation, or any other authority to support it. Nor does PGE offer any. In the absence of any analysis or authority for PGE's argument the OPUC approval was necessary for Columbia Steel to become a customer of PP&L, we cannot hold that it has any merit."

---

[20] Specifically, the district court does not explain how this statement squares with its analysis leading to its rejection of PGE's state-action immunity defense.

APPENDIX C

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

COLUMBIA STEEL CASTING CO., INC., an Oregon corporation, Plaintiff-Appellee, v. PORTLAND GENERAL ELECTRIC COMPANY, an Oregon corporation; Defendant-Appellant	No. 93-35902 D.C. No. CV-90-00592-HJF
COLUMBIA STEEL CASTING CO., INC., an Oregon corporation, Plaintiff-Appellant, v. PORTLAND GENERAL ELECTRIC COMPANY, an Oregon corporation; Public Utility Commision of the State of Oregon, Defendants-Appellees.	No. 93-35958 D.C. No. CV-90-00524-HJF OPINION

Appeals from the United States District Court
for the District of Oregon
Helen J. Frye, District Judge, presiding

Argued and Submitted
May 3, 1995 - Portland, Oregon

Filed July 20, 1995

Before: James R. Browning, Thomas M. Reavley*,
and William A. Norris, Circuit Judges.

Opinion by Judge Norris

OPINION

NORRIS, Circuit Judge:

This case involves the antitrust doctrine of state action immunity. Appellee Columbia Steel (Columbia) sued appellant Portland General Electric (PGE) in district court, alleging that PGE had conspired with Pacific Power & Light (PP&L) to divide the market for electricity in Portland, Oregon. The district court granted summary judgment for Columbia, rejecting PGE's claim that a 1972 order of the Public Utility Commission of Oregon (PUC) had authorized the market division, thereby conferring federal antitrust immunity under the state action doctrine created in *Parker v. Brown*, 317 U.S. 341 (1943). PGE appeals the summary judgment in favor of Columbia and the denial of its own motion for summary judgment. We now reverse.

---

*The Honorable Thomas M. Reavley, Circuit Judge, United States Court of Appeals for the Fifth Circuit, sitting by designation.

I

Until the early 1970s, Portland General Electric and Pacific Power & Light competed with one another to provide electricity to the residents and businesses of Portland. This competition resulted in duplicate transmission lines and poles, substations and transformers throughout the City. In 1961, the Oregon legislature enacted a statute empowering the PUC to authorize division of markets into exclusive service territories in order to promote "[t]he elimination and future prevention of duplication of utility facilities." Or. Rev. Stat. § 758.405. The statute provides that under certain circumstances, the PUC may approve a contract between competitors that divides a market into exclusive service territories. Or. Rev. Stat. §§ 758.410-758.450. Once the PUC has issued an order creating exclusive service territories, Or. Rev. Stat. § 758.465 prohibits any competition within those territories.

In 1972, PGE and PP&L entered into an agreement to exchange properties and customer accounts throughout the City of Portland (the Agreement). In simplified form, the Agreement divided the City and transferred properties and customers, thereby creating separate territories in which one utility or the other owned all the facilities and serviced all the customer accounts.[1] Before presenting this Agreement to the

---

[1]The Agreement provided, in relevant part:

NOW, THEREFORE, in order to implement the elimination of said duplicating facilities . . . it is agreed:

1. *Exchange of Facilities*

(a) Pacific shall transfer and convey to Portland General . . . all the electric distribution plant, including distribution substations, poles, lines, transformers, meters . . . maintained by Pacific in the area designated as Pacific's Rainier service district . . . and in the area designated as Parcel C . . .

(b) Portland General shall transfer and convey to Pacific . . . all of the electric distribution plant, including distribution substations,

PUC, the parties sought the approval of the City. The City consented to the Agreement by ordinance on April 26, 1972.[2]

---

poles, lines, transformers, meters . . . maintained by Pacific in the areas designated as Parcels A and B . . . .

. . . .

7. Transfer of Customer Accounts

The transfer of customer accounts between Portland General and Pacific shall commence on July 24, 1972, and shall be coordinated so that revenue from the sales of electricity of each company will remain substantially the same over the period required to accomplish transfer of all customers involved. At the time of such transfer, each party shall make available to the other a list of the transferred customers, together with accounting, billing, service and historical sales records relating thereto . . . .

[2]The ordinance states, in part:

An Ordinance consenting to exchange of certain property within the City between Portland General Electric Company and Pacific Power & Light Company on certain conditions in order to permit reduction of poles and wires and duplication of facilities in various areas of the City.

The City of Portland ordains:

Section 1. The council finds the both [PGE] and [PP&L] operate electric power systems which serve patrons within the City, that both companies operate under non-exclusive franchises and that the obligation to supply properties within the City must remain binding upon both companies; that at the present time, however, in many areas of the City poles and wires are duplicated between the companies for service purposes . . . .; that to reduce the visual impact of duplicating facilities, to promote safety, to promote economy, to simplify subsequent undergrounding and to work toward the lowest possible rate for users within the City, an interchange of properties between companies should be permitted as hereinafter set forth . . . now, therefore, the City does by this ordinance consent to the sale, transfer and exchange of plant and property between [PGE and PP&L] as follows.

Portland, Or., Ordinance 134416 (Apr. 26, 1972).

The Agreement was subsequently approved by the PUC through Order 72-870, which provides, in part:

> The Commissioner's approval is needed prior to the sale, lease, assignment or other disposition of public utility property pursuant to ORS 757.480. The Commissioner's approval is also needed prior to the assignment of any allocated utility service territory pursuant to ORS 758.460.
>
> On July 18, 1972, Pacific and Portland General entered into an agreement whereby an exchange of property and utility facilities would be made . . . . This exchange and transfer also involves the transfer of customers from one party to the other.
>
> . . . .
>
> ORDERED that the application of [PP&L] to transfer certain of its exclusively served area allocated to it and lying in and around Rainier, Oregon, to [PGE] is approved . . .
>
> ORDERED that [PP&L] may transfer to [PGE] all electric distribution plant . . . situated within or used for providing utility service within the boundaries of Parcel A . . . [and] Parcel B . . . .[3]
>
> ORDERED that [PGE] may transfer to [PP&L] all electric distribution plant . . . used for providing utility service within the boundaries of [Parcel C] . . . .
>
> . . . .

---

[3]Parcels A, B, and C are all within the City of Portland. The City of Rainier service area had previously been allocated of PP&L as an exclusive service territory by the PUC.

> ORDERED that the manner and method of accomplishing the transfer and exchange of property, facilities and customers, and the terms and conditions governing this transfer shall be provided by that agreement between the companies herein, dated July 18, 1972 . . . .

Pub. Util. Comm'n of Or., Order 72-870 (Dec. 15, 1972) (the 1972 Order).

In the years that followed, PGE and PP&L did not compete with each other in their respective territories. During this time, Columbia Steel was served by PGE. However, in 1989, reacting to the difference in industrial rates charged by PP&L and PGE, Columbia requested PP&L to provide electrical service to its Portland plant. After considering Columbia's request, PP&L informed both PGE and Columbia that it would offer electricity to Columbia. PGE objected that PP&L was forbidden from selling power to Columbia by the 1972 Agreement and the 1972 Order, which, PGE claimed, had created exclusive service territories in Portland.

In June, 1990, Columbia filed an action in federal court against PGE, PP&L and the PUC, requesting a declaration that any purported division of Portland into exclusive service territories was beyond the scope of the 1972 Order and a violation of §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1-2. Columbia also asked for treble damages. In its answer, PGE raised a defense of state action immunity, claiming that the 1972 Order had authorized exclusive service territories in Portland pursuant to state law.

While this action was pending in federal district court, PGE filed an application with the PUC, requesting a declaration that the 1972 Order allocated exclusive service territories in Portland. The district court denied PGE's subsequent motion to stay the federal case pending the PUC's ruling on this application, and proceeded to consider cross-motions for summary judgment on the immunity issue.

In July, 1991, the district court granted partial summary judgment to Columbia, holding that the 1972 order did not confer antitrust immunity on PGE's attempts to divide the Portland market. The court reasoned that the 1972 Order did not "clearly articulate" the intention of the PUC to divide Portland into exclusive service territories, but instead was limited to the exchange of property and facilities and a one-time transfer of customer accounts. *Pacificorp v. Portland Gen. Elec. Co.*, 770 F. Supp. 562, 571 (D. Or. 1991).

Nine months later, in April, 1992, the PUC issued its ruling on PGE's application for a declaratory order, stating that while "perhaps [the 1972 Order] did not unambiguously allocate exclusive service territories to PGE and PP&L," it was PUC's intent to approve such an allocation. Pub. Util. Comm'n of Or., Order 92-557 (Apr. 16, 1992). The PUC therefore amended its 1972 Order, *nunc pro tunc*, to make this intention clear. In response to this ruling, PGE requested that the district court reconsider its summary judgment decision and afford full faith and credit to the PUC's decision. The district court denied the motion.

Subsequently, the court entered summary judgment on the remaining issues, holding that PGE had violated § 1 of the Sherman Act and awarding Columbia $508,425 in treble damages and $901, 671.62 in attorney's fees and costs.

II

Our discussion of the state action doctrine begins with *Parker v. Brown*, 317 U.S. 341, 350-51 (1943), in which the Supreme Court reasoned that Congress did not intend the Sherman Act "to restrain a state or its officers from activities directed by its legislature." The Court held, therefore, that acts of a state are immune from antitrust liability. This basic premise has evolved into a multitiered analysis for determining when an anticompetitive act may be cloaked with antitrust immunity because it implements state policy. Immunity is

automatically granted to any action taken by a state legislature or by a state court in its legislative capacity. *See Hoover v. Ronwin*, 466 U.S. 558, 567-68 (1984). However, "when the activity at issue is not directly that of the legislature or supreme court, but is carried out by others pursuant to state authorization" closer analysis is required to assure that the challenged action represents an implementation of state policy rather than private or parochial interests. *Id.* at 568. Thus, immunity is granted to acts of state agencies or municipalities only if "the conduct is pursuant to a 'clearly articulated and affirmatively expressed state policy' to replace competition with regulation." *See Hoover*, 466 U.S. at 568-69.

The acts of private parties, such as those at issue in this case, are scrutinized even more carefully to assure that the "private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests." *Patrick v. Burget*, 486 U.S. 94, 100 (1988). To that end, the actions of a private party are immunized only after passing a two-pronged test: "First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy; second, the policy must be actively supervised by the State itself." *Federal Trade Commission v. Ticor Title Ins. Co.*, 112 S. Ct. 2169, 2176 (1992).

There is no question that the Oregon legislature has clearly and expressly chosen to replace competition with regulation in the utilities industry by allowing the PUC to approve agreements to divide markets into exclusive service territories. *See* Or. Rev. Stat. §§ 759.500-759.570. The issue in this case is the clarity with which the PUC must express its approval and whether that standard has been met here.

When a state legislature authorizes anticompetitive behavior contingent upon approval by a state agency, that approval must be "clearly articulated and affirmatively expressed." *Cf. California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980); Phillip

Areeda & Donald F. Turner, *Antitrust Law* ¶ 214e (1978). While the clear articulation test originally developed in a slightly different context - cases examining whether a state statute had "clearly articulated and affirmatively expressed" a policy to permit particular anticompetitive[4] - its underlying policy rationale applies with equal weight when the authorizing entity is a regulatory agency, rather than a state legislature. As in its original context, the clear articulation test here serves to "ensure that private parties [can] claim state-action immunity only when their anticompetitive acts [are] truly the product of state regulation," *Patrick*, 486 U.S. at 100. We therefore hold that when a private party claims state action immunity conferred by a state agency, the clear articulation test must be satisfied as to purported authorizations by both the state legislature and the state agency. That is to say, not only must the state make clear that it is delegating authority to the PUC to approve market decisions, but the PUC must also exercise this authority clearly and expressly. *See* Areeda & Hovenkamp, *Antitrust Law* ¶ 214e.

The next question, then, is how clearly an agency must express its approval. Columbia argues that the PUC could not have immunized the PGE-PP&L agreement not to compete in Portland without clearly expressing an intent to permit a division of the City into exclusive service areas. PGE responds that the PUC's actions meet the "clear articulation" requirement even if the 1972 Order is somewhat ambiguous. In order to reach this result, argues PGE, we should apply a "foreseeability" standard, rather than a clear statement rule, in analyzing the PUC's actions under the *Parker* test.

---

[4]*See City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 370-73 (1991); *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 54-56 (1982); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 41-44 (1985); *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 63-65, *Midcal*, 445 U.S. at 99-100, 102-103; *Patrick v. Burget*, 800 F.2d 1498, 1505 (9th Cir. 1986), *rev'd on other grounds*, 486 U.S. 94 (1988).

In support of its argument for a "foreseeability" standard, PGE cites a series of cases regarding actions taken by subunits of state government pursuant to statutory authorization. Although these decisions do not address conduct by private parties, the Court's analysis is applicable to the case at hand. In *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), the court adopted the view of the plurality in *Lafayette v. Louisiana Power & Light*, 435 U.S. 389, 415 (1978), holding that "[i]t is not necessary . . . for the state legislature to have stated explicitly that it expected the City to engage in conduct that would have anticompetitive effects." *Town of Hallie*, 471 U.S. at 42. Instead, the Court held that immunity was extended to a municipality's actions if "the legislature contemplated the kind of action complained of." *Id.* at 44 (quoting *Lafayette*, 435 U.S. AT 415). As our court later explained, when a state delegates power to a subunit of state government, it "must be assumed to have contemplated the use of restraints on competition that are a reasonable consequence or necessary corollary of anticompetitive restrictions authorized by the legislature." *Washington State Elec. Contractors Ass'n v. Forrest*, 839 F.2d 547, 553 (9th Cir.), *cert. granted & vacated on other grounds*, 488 U.S. 806 (1988). Thus, in cases challenging anticompetitive acts of municipalities, the Supreme Court has held that the clear articulation test is met if a municipality's "suppression of competition is the 'foreseeable result' of what the state authorizes." *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 373 (1991).

In *Nugget Hydroelecrtic v. Pacific Gas and Electric*, 981 F2.d 429 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2336 (1993) and *Medic Air Corp. v. Air Ambulance Auth.*, 843 F2.d 1187 (9th Cir. 1988), this court extended the "foreseeability" standard to cases in which a private party claimed state agency authorization of its anticompetitive acts. We therefore follow *Nugget Electric* and *Medic Air* and apply the "foreseeability" standard here.

In *Nugget Hydroelectric v. Pacific Gas and Electric*, 981

F2.d at 433-435, we considered whether regulations promulgated by a state public utility commission were sufficiently clear to confer state action immunity on a privately owned utility. We stated that the utility would be entitled to state action immunity if the conduct was "clearly articulated and affirmatively expressed state policy. This may be satisfied if the conduct is a 'foreseeable result' of the state's policy." *Id.* at 434. We then scrutinized the relevant PUC regulation and determined that the defendant's action was " a foreseeable result of state policy, and therefore satisfies the clear articulation requirement of the state action doctrine." *Id.*

In *Medic Air Corp.*, 843 F2.d at 1189, a county agency designated an air ambulance company as the exclusive air ambulance dispatcher in Washoe County, Nevada. We held that this authorization did not immunize the company from complaints that it was using its position as exclusive dispatcher to direct ambulance business to itself and to exclude its competitors. In so doing, we applied the foreseeability standard, starting "[t]he alleged anticompetitive conduct was not a 'necessary or reasonable consequence' of the [agency's] decision to establish an exclusive dispatcher." *Id.* (quoting *Springs Ambulance Svc., Inc. v. City of Rancho Mirage*, 745 F.2d 1270, 1273 (9th Cir. 1984)).

Under existing Ninth Circuit caselaw then, private conduct is immunized if it is a foreseeable result of state agency action and if circumstances justify an inference that the agency intended to authorize the conduct. We now turn to the question whether PGE's conduct in agreeing with PP&L to divide Portland into exclusive service territories was a foreseeable result of the PUC's 1972 Order.

III

We agree with the district court that "[t]he difficult issue in this case is whether the 1972 Agreement effected a territorial division of customers as contemplated by the Oregon

legislature." 770 F. Supp. at 570. Unfortunately, the 1972 order is not particularly clear regarding the PUC's intention to permit a permanent division of the Portland market, as opposed to one-time exchange of facilities and customer accounts. For this reason, the district court held that the Order failed to meet the strict "clear articulation" test. However, we believe that under our current, more liberal "foreseeability" standard, the 1972 Order is sufficiently clear to cloak the PGE-PP&L agreement with state action immunity.

Columbia argues that PGE's anticompetitive conduct was not a foreseeable result of the 1972 Order because the Order limits PUC approval to an exchange of properties and a one-time transfer of customer accounts. Columbia points out that the Order never uses the term "exclusive territory" to refer to the arrangement being approved, even though it does use that term to describe the area around the City of Rainier, which had previously been declared the exclusive territory of PP&L. Furthermore, in setting the legal framework for the PUC ruling on the application, the Order does not mention the statutory provisions that authorize the PUC to approve agreements creating exclusive service territories (Or. Rev. Stat. §§ 758.410 - 758.440), even though it does refer to the statutory provisions requiring PUC approval for the sale of utility company property (Or. Rev. Stat. § 757.480) and for the transfer of a previously allocated exclusive territory (*Id.* at § 758.460).

We agree that these omissions tend to create the impression that the PUC did not intend to approve the creation of new exclusive service areas for PGE and PP&L in the City of Portland. But such a reading of the 1972 Order would leave ambiguous the purpose behind the PUC's clear authorization of a transfer of facilities and customer accounts between PGE and PP&L. Columbia argues that by approving the transfer, the PUC may have intended to authorize the creation of de facto exclusive territories, but only on a temporary basis. PGE, however, points to other aspects of the Order to support its position that the PUC intended to approve a long-term division

of Portland into two exclusive service areas.[5] Most powerfully, PGE argues that there would be little point in creating single-provider territories if customers could later choose to return to their original provider. The initial division was desirable largely because it eliminated the need for duplicate poles, lines and other facilities in each territory. This benefit would be lost if each utility were at liberty to serve customers in each other's areas by again duplicating poles and lines.

Columbia responds first by suggesting that the PUC intended to permit customers to switch utilities by requiring the primary utility in their area to transport its competitor's electricity to them through a process called "wheeling." With the wheeling process in use, only one set of power lines and facilities would be required for each territory, but each customer would still have a choice of providers. Columbia has not shown, however, any indication of an intention on the part of the PUC to permit or require wheeling arrangements; indeed, we find some indication that the PUC intended the contrary. The original version of the 1972 Agreement provided that employees of each utility would be continued to be served by their employers regardless of the territory in which they lived, apparently in order to permit the utility workers to continue receiving employee discounts on electricity. In the final version of the 1972 Order, however, utility employees were required to purchase from the utility serving the area in which they lived. The 1972 Order provides:

> This method results in discrimination in that the company serving the area should serve all persons living in that area and, just because the customer is an employee of the utility, this should not permit him the

---

[5]PGE also argues that the district court erroneously failed to give full faith and credit to the PUC's 1992 decision interpreting and amending the 1972 Order to make it clear that it intended to create exclusive service territories in 1972. Because we reverse on the basis of our reading of the 1972 Order, we do not reach the full faith and credit question.

> right to choose which utility he will take.
> . . . [T]hese employees, like any other customers in the area, must become the customers of the new utility serving the area.

Order 72-870 at 7. Thus the PUC did not permit wheeling even for the narrow purpose of allowing utility employee-customers to be served by their respective employers. This amendment to the original order is, of course, inconsistent with Columbia's position that the transactions between PGE and PP&L, which necessarily resulted in separate service areas, were approved by the PUC as temporary, de facto measures that could be circumvented by "wheeling."

Columbia next argues that the PUC intended at least to permit customers to change providers when doing so would not require duplication of facilities. Again, the facts of this case are to the contrary. Although PP&L continued to own a transmission wire running across Columbia's property which would have enabled PP&L to serve Columbia without duplicating PGE's facilities, there is nothing in the Order to suggest that the PUC intended to permit PP&L to serve a customer in PGE's territory in this way. Although such an exception might have been consistent with the PUC's overall goals, there is no indication that the 1972 Order permitted it.

PGE argues that Columbia's position is undercut by six orders issued by the PUC between 1972 and 1989. According to PGE, these orders render its understanding of the 1972 Order more reasonable, and its 1989 decision to oppose PP&L's service to Columbia more foreseeable. Order 74-658 addresses the issue at hand most directly.[6] In it, the PUC denied PP&L's

---

[6]The other orders cited by PGE are less clear, but are also consistent with PUC approval of exclusive service territories. In 1975, the PUC noted that PP&L served customers "in parts of Portland." Pub. Util. Comm'n of Or., Order 75-704 (Aug. 13, 1975). Orders issued in 1973 and 1979 described PGE's "service area" as situated "within a state-approved service

request for a tariff that would equalize the two utilities' rates in Portland, reasoning the "[t]he two companies no longer competitively serve the same area. Their respective areas of service within Portland have been defined." Pub. Util. Comm'n of Or., Order 74-658 (Sept. 3, 1974), *aff'd sub nom American Can Co. v. Davis*, 559 P.2d 898 (1976). This official statement, issued before the acts that gave rise to this lawsuit,[7] is an authoritative clarification of the PUC intention.[8]

Columbia responds that Order 74-658 did nothing more than observe that the utilities were not, in fact, competing, and so did not address whether they were legally entitled to refrain from competition. But this interpretation fails to account for the PUC's statement that the utilities' "respective areas of service within Portland have been defined." Surely if the PUC observed that the utilities had carved out exclusive territories without PUC approval, it would have taken action to prevent violation of its 1972 Order. The most reasonable interpretation of this statement is that the PUC believed in 1974 that the 1972 Order had created exclusive service territories which the utilities

---

area allocation." Pub. Util. Comm'n of Or., Order 73-688 (Oct. 25, 1973); Pub. Util. Comm'n of Or., Order 79-055 (Jan. 25, 1979).

[7]Of course, PGE cannot base its foreseeability argument on the clarifications made by the PUC *after* the anticompetitive conduct at issue in this case, since it could not have relied upon those statements when it decided to oppose the transfer of Columbia to PP&L. The question is whether the anticompetitive actions were authorized when undertaken, which turns on whether they were a foreseeable consequence of the actions the PUC had taken up to that point. Thus, neither the PUC's retroactive amendment of its 1972 Order in 1992, nor its litigation positions in this case, can create PGE immunity for actions taken in 1989-90.

[8]Both PGE and Columbia also present a variety of extrinsic evidence, including deposition testimony of former PUC Commissioners, to demonstrate the Public Utility Commissioner's subjective understandings of what they intended to approve in 1972. The district court properly refused to consider such evidence. Immunity is conferred by the official actions of state government, not by the subjective intentions of state officials.

were respecting.

Columbia's strongest argument is that the Agreement and the 1972 Order were intentionally made ambiguous in order to slip the Agreement past the City of Portland, which had successfully opposed a past attempt by PGE to be allocated exclusive service territories in the City. Before presenting their Agreement to the PUC, the utilities sought approval from the City.[9] Columbia presents evidence to show that the City was adamantly opposed to any agreements that would result in the division of Portland into exclusive service territories.[10] PGE

---

[9]There is a dispute over whether City approval was actually necessary in order to proceed with the proposal before the PUC. Columbia points to the franchise agreement between PP&L and the City, which authorizes PP&L to use the public streets for transportation of electricity. The ordinance granting this franchise includes a provision requiring City approval of any anticompetitive combinations between PP&L and any other provider. PGE and the PUC argue that the City does not have the power to use its franchising authority to veto exclusive service territories created by the PUC pursuant to Or. Rev. Stat. §§ 758.410 *et seq.* For our purposes, it makes little difference whether the utilities were required to receive City approval, or simply chose to solicit approval to avoid City opposition to the proposal before the PUC. In granting state action immunity, we do not inquire whether "the state's attempted exercise of its power is imperfect in execution under its own law. . . . Ordinary errors or abuses in the administration of powers conferred by the state should be left for state tribunals to control." *Llewellyn v. Crothers,* 765 F2.d 769, 774 (9th Cir. 1985) (internal quotation marks omitted); *see also City of Columbia*, 499 U.S. at 371-372. Thus, even if the PUC lacked authority under state law to approve an agreement to create exclusive service territories in derogation of the City's franchising power, this is one of the "[o]rdinary errors or abuses in the administration of powers" that do not defeat a claim for state action immunity.

[10]In 1962, PGE filed an application with the PUC for creation of exclusive service territories for PGE in the areas it served throughout the state, including Portland. The City passed a resolution opposing the application, claiming that it interfered with the City's right to regulate service in the City by controlling franchises. Portland, Or., Resolution 28879 (Aug. 22, 1962). PGE then amended its application to exclude an allocation in Portland, after which the City withdrew its opposition and the PUC approved the application.

admits that while prior drafts of the Agreement included specific language making clear that the parties intended to create such territories, that language was removed before the contract was presented to the City. This had the natural result of making the contract more ambiguous and thereby less politically vulnerable.

Columbia suggests that these facts establish either 1) that in response to the known opposition of the City to monopolistic agreements, the utilities did not ask for and did not receive permission from the PUC to create exclusive service territories; or 2) that the utilities succeeded in slipping a monopolistic agreement past the City, a ploy that should not be awarded with antitrust immunity. Both arguments have some force, but we ultimately find them unconvincing.

Even assuming that Columbia has described this context accurately, we still must conclude that the 1972 Order had the foreseeable effect of leading PGE and PP&L to stop competing in the territories created by the Order. If the PUC had in fact intended to bow to potential pressure from the City and to decline to authorize permanent exclusive territories, we cannot see why it would have chosen, nonetheless, to permit a one-time transfer of thousands of customer accounts to create merely temporary exclusive territories. We must conclude that the elimination of competition between PGE and PP&L was a natural and foreseeable result of the 1972 Order, especially as clarified by Order 74-658.

Second, while Columbia's allegations about PGE's maneuvering are forceful, we conclude that they cannot effect the outcome of the state immunity analysis in this case. The

---

In its 1972 ordinance, the City also stated that "both companies operate under non-exclusive franchises and that the obligation to supply properties within the City must remain binding upon both companies." Ordinance 134416. Columbia argues that this shows the City's continuing opposition to exclusive service territories and its understanding that the 1972 Agreement did not provide for them.

question of immunity ultimately turns on whether the State, acting through the PUC, approved the division of the market. We do not inquire into the wisdom of the State's decision. Nor do we inquire whether the parties were conspiring to hoodwink the City of Portland or otherwise acting in bad faith. See Columbia, 499 U.S. at 376-78. "The availability of *Parker* immunity . . . does not depend on the subjective motivations of the individual actors, but rather on the satisfaction of objective standards set forth in *Parker* and the authorities which interpret it." *Llewellyn v. Crothers*, 765 F2.d at 774. These authorities make clear that regardless of the tactics used to secure state authorization, "*any* action that qualifies as state action is '*ipso facto* . . . exempt from the operation of the antitrust laws.'" *Columbia*, 499 U.S. at 377-78 (Quoting *Hoover*, 365 U.S. at 568).

CONCLUSION

Under our current caselaw, the "clear articulation" requirement, even when applied to private conduct, requires only that the anticompetitive conduct be sufficiently foreseeable to justify the inference that it was intended by the authorizing agency.[11] We therefore conclude that the district court erred in granting Columbia summary judgment and in denying summary judgment to PGE.

---

[11]In a footnote in its brief, Columbia asserts -- but does not argue -- that PGE fails the "active supervision" prong of the state action immunity test and cites its brief before the district court. Appellee's Opening Brief at 17 n.16. PGE argues that this does not suffice to raise the issue. Appellant's Reply Brief at 6. We decline to order a remand to consider an issue raised in such a manner and having so little merit. The PUC had and exercised the authority to approve or disapprove the market division, was actively involved in overseeing the details of the division of the Portland market, and continues to exercise extensive control over the behavior of the utility companies pursuant to statute. *See* Or. Rev. Stat. §§ 756.040, 756.070 - 756.200, 758.400 - 758.470; *Patrick v. Burget*, 486 U.S. at 101-02; Pub. Util. Comm'n of Or., Order 72-870 (Dec. 15., 1972).

We REVERSE the summary judgment in favor of Columbia Steel and REMAND to the district court for entry of judgment in favor of Pacific [sic] General Electric.

APPENDIX D

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PACIFICORP, doing business as Pacific Power & Light Company, an Oregon corporation Plaintiff, v. PORTLAND GENERAL ELECTRIC COMPANY, an Oregon corporation; COLUMBIA STEEL CASTING CO., INC., an Oregon corporation; and PUBLIC UTILITY COMMISSION OF OREGON, Defendants.	(CONSOLIDATED CASES) Civil No. 90-524-FR (LEAD)
	O P I N I O N
COLUMBIA STEEL CASTING CO., INC., an Oregon corporation, Plaintiff, v. PORTLAND GENERAL ELECTRIC COMPANY, an Oregon corporation;	Civil No. 90-592-FR

PACIFICORP, doing business as Pacific Power & Light Company; MYRON B. KATZ, NANCY RYLES, and RONALD EACHUS,

Defendants.

FRYE, Judge:

The matters before the court are:

1) the motion to stay (#20) of Portland General Electric Company (PGE);

2) the motion to stay (#30) of the Public Utility Commission of the State of Oregon (PUC);

[omitted]

BACKGROUND

In 1972, PGE and Pacificorp, doing business as Pacific Power & Light Company (PP&L), entered into an agreement (the 1972 Agreement)[1] to exchange electric distribution properties and customer accounts in defined areas within and around the City of Portland in order to eliminate duplicate electric utility facilities. In general, PP&L transferred its properties and customers within the Rainier Service District, an area which the agreement labels as "Parcel C," to PGE in exchange for PGE's transfer to PPL of its properties and customers in areas labeled Parcels A and B in the 1972 Agreement.

[1] In the complaint, PP&L uses the label "Facilities Agreement" to refer to the 1972 Agreement between PGE and PP&L. However, PGE objects to this label. Therefore, the court has chosen to refer to the agreement as the "1972 Agreement."

The City of Portland consented to the agreed exchange.[2] The Public Utilities Commissioner approved the agreement. By Order 72-870, the PUC approved "the transfer of certain exclusively served territory in the Rainier area from Pacific Power & Light Company to Portland General Electric Company and approv[ed] the transfer and exchang[e] of utility property and facilities and customers between the two companies as applied for." Exhibit 1 to PGE's Motion to Stay, p. 39.

Columbia is within the area identified by the 1972 Agreement as Parcel C. Parcel C is the area from which PP&L transferred its property and customers to PGE. At the time the agreement was signed, Columbia was not a customer of PP&L. Columbia has always been a customer of PGE. Columbia purchases electricity from PGE pursuant to an Agreement for Electric Power Service (PGE Agreement) which is automatically renewed on a yearly basis until one party provides written termination notice to the other party at least thirty days prior to the anniversary date of the start of the first term of the agreement, July 1, 1980.

At present, the electric rates for PP&L's industrial customers, such as Columbia, are less than the electric rates for PGE's industrial customers. Columbia has requested PP&L to provide it with electricity. PP&L owns a transmission line that crosses the plant site of Columbia.

In a letter from Columbia to PGE[3], dated May 30, 1990, Columbia notified PGE that because PGE had announced that it might seek, through litigation, to prevent PP&L from providing electricity to Columbia, PP&L had not constructed a necessary substation to supply Columbia with alternate electric service. In the letter, Columbia requested PGE to deliver electricity provided by PP&L to Columbia as of 12:00:01 a.m.

---

[2] Ordinance No. 134416, passed April 26, 1972, effective May 26, 1972.

[3] Exhibit A to Answer and Counterclaims of Columbia, p. 35.

July 1, 1990, and until the resolution of litigation. In a letter from PGE to Columbia[4], dated May 30, 1990, PGE stated that Columbia was within the exclusive service territory of PGE and therefore must purchase electricity from PGE.

On May 31, 1990, PP&L filed this action, Civil No. 90-524-FR, seeking a declaratory judgment against PGE, Columbia and the PUC. PP&L prays for a judgment declaring the rights and obligations of the parties under the PGE Agreement, the 1972 Agreement, and the Sherman Antitrust Act.

On June 19, 1990, Columbia filed a related action, Civil No. 90-592-FR, now consolidated with Civil No. 90-524-FR (this action), for a declaratory judgment, injunctive relief and damages against PGE, PP&L, and PUC Commissioners Myron B. Katz, Nancy Ryles (now deceased), and Ronald Eachus. Columbia seeks a judicial declaration of the rights and obligations of the parties as follows:

a. that Columbia may terminate the PGE Agreement and take service from Pacific;

b. that PGE does not have an exclusive right to serve Columbia under the terms of the Facilities Agreement;

c. that the Portland City Charter, state utility law and Portland franchise agreements permit Pacific to serve Columbia;

d. that the PUC's Order 72-870 does not empower or authorize PGE to monopolize electric power service to Columbia Steel, nor does it serve to foreclose Pacific from providing electric service to Columbia Steel;

e. that the Portland City Charter prohibits the formation of exclusive service territories within the City of Portland;

---

[4] Exhibit A to Answer and Counterclaims of Columbia, p. 37.

f. that the wrongful conduct by defendants PGE and PUC alleged herein, to prevent service to Columbia Steel from alternative electric power suppliers violates state utility laws and Federal and state antitrust laws; and,

g. that Pacific is obligated by applicable Federal antitrust law, state antitrust law and state utility statutes to serve Columbia Steel upon request.

Columbia Complaint, para. 39.

On July 2, 1990, PGE filed an application with the PUC for orders concerning territorial allocations within the City of Portland. PGE's application requests cumulatively, and not in the alternative, as follows:

1. pursuant to O.R.S. 756.450 and O.A.R. 137-02-010 to 060, a declaratory order of the PUC affirming that the order[5] allocated exclusive service territory in the City of Portland;

2. pursuant to O.R.S. 758.420 and O.A.R. 860-25-010, an order of the PUC approving an agreement between PGE and PP&L allocating to PGE certain service territory in the City of Portland; and

3. pursuant to O.R.S. 758.435 and O.A.R. 860-250-010, an order of the PUC allocating to PGE certain territory in the City of Portland now served exclusively by PGE.

On July 3, 1990, PGE filed a motion to stay this proceeding until after the resolution of its application before the PUC. On July 30, 1990, the PUC filed both its answer to the

---

[5] PUC Order 72-870 approving the 1972 Agreement.

combined complaints and a motion to stay these proceedings until the related action before it is complete.

In answer to the combined complaint, the PUC denied, due to insufficient knowledge, nearly all of the allegations. However, it did admit that the 1972 Agreement created allocated service territories within the City of Portland and did admit that PP&L is barred from providing electric service to Columbia. PUC Answer, para. 13.

On August 1, 1990, PGE filed its answers to the complaints. PGE alleges that PUC Order 72-870 approving the 1972 Agreement legally created exclusive service territories and that under the state action doctrine, the agreement and the utilities are immune from federal antitrust laws. Alternatively, PGE alleges that the PUC has interpreted its 1972 order as establishing exclusively served territories and that PGE acted in good faith in complying with the order as interpreted by the PUC.

CONTENTIONS OF THE PARTIES

PGE argues that the issues in its related application before the PUC are dispositive of the claims in this case. PGE argues that "[t]he PUC does have the power to immunize the alleged violations of the antitrust laws under the state action doctrine." PGE Reply in Support of Motion to Stay, p. 15 (emphasis in original). PGE contends that the state action doctrine applies if the PUC has clearly articulated and affirmatively expressed state policy and is actively supervising territorial allocation. PGE contends that the PUC should be permitted to resolve any ambiguities regarding the meaning of its order as material aid to this court in ultimately deciding the case.

PGE contends that both its application with the PUC and this case seek a declaration of prospective rights and obligations as they relate to the provision of electric service by PP&L to Columbia. PGE characterizes the allocation of territories as a

technical and a policy decision. PGE argues that the doctrine of primary jurisdiction justifies preliminary action by the PUC. In summary, PGE argues that this court should stay this case until after the PUC has responded to its request for prospective allocation.

The PUC also asserts that the doctrine of primary jurisdiction requires a stay of this case. The PUC acknowledges that an issue raised by Columbia is whether the PUC has authority to allocate territory in cities which franchise two or more utilities. The PUC asserts that because it "has been interpreting territorial allocation statutes for years," it should "have first call." PUC Motion to Stay, p. 8. The PUC contends that "[i]f nothing else, what the PUC decides on PGE's request for <u>prospective</u> allocation of territory is something for which this court should wait." PUC Motion to Stay, p. 9 (emphasis in original).

Columbia responds that the motions to stay should be denied because the doctrine of primary jurisdiction does not apply. Columbia argues that the interpretation of the meaning of the 1972 order is not a technical, but rather a legal, question. Columbia also contends that the administrative proceeding will not address the antitrust aspects of this case. Columbia asserts that "PGE's asserted defense to the anti-trust laws requires a determination by the Court of the legal effect of a contract between PGE and PP&L and the 1972 Order." Columbia's Memo in Opposition, p. 3.

Columbia argues that a central question in this case is whether the law allows territorial allocations within the City of Portland, not whether the territory in question is appropriate for exclusive service. Columbia further asserts that as a party to the case, the PUC can determine and then assert its view of the meaning and effect of the 1972 order.

Columbia also argues that a determination of these issues by the court would assist and instruct rather than interfere with the administrative agency carrying out its lawful mandate.

ANALYSIS

The decision whether to proceed is within the discretion of the court. The doctrine of primary jurisdiction applies where the resolution of a claim before a court requires the resolution of issues by the court, which under a regulatory scheme have been placed within the special competence of an administrative body. In such a case, the judicial process is suspended pending referral of such issues to the administrative body for its views. United States v. Western Pac. R.R., 352 U.S. 59, 64 (1956). The doctrine of primary jurisdiction calls for the referral of a case to an administrative body for preliminary review when issues not within the conventional experience of judges are raised or when the case requires the exercise of administrative discretion. The doctrine of primary jurisdiction promotes the uniform and expert administration of the regulatory scheme.

The PUC is a party to this proceeding and has asserted in its answer that the 1972 Agreement "created allocated service territories within Portland and that Pacific is barred from providing electric service to Columbia." PUC Answer, para. 13. "Allocated territories" can only be created by approval of the PUC. See O.R.S. 758.400(1). Implicitly, the PUC has charged that it has the authority, and has exercised that authority, to create allocated territories within the City of Portland. The PUC has already addressed the issue before this court and will have an opportunity to address it again in this proceeding. Whether PUC Order 72-870 legally created allocated territories within the City of Portland is an issue riper for judicial determination. The doctrine of primary jurisdiction does not justify a stay of this case.

The motions to stay, PGE #20 and PUC #30, are denied.

CONCLUSION

1. PGE's motion to stay (#20) is denied.

2. PUC's motion to stay (#30) is denied.

[omitted]

DATED this 27th day of September, 1990.

/s/_____
HELEN J. FRYE
United States District Judge

APPENDIX E

APPENDIX E

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PACIFICORP, doing business as Pacific Power & Light Company, an Oregon corporation Plaintiff, v. PORTLAND GENERAL ELECTRIC COMPANY, an Oregon corporation; COLUMBIA STEEL CASTING CO., INC., an Oregon corporation; and PUBLIC UTILITY COMMISSION OF OREGON, Defendants.	(CONSOLIDATED CASES) Civil No. 90-524-FR (LEAD)
OPINION	
COLUMBIA STEEL CASTING CO., INC., an Oregon corporation, Plaintiff, v. PORTLAND GENERAL ELECTRIC COMPANY, an Oregon corporation;	Civil No. 90-592-FR

PACIFICORP, doing business as Pacific Power & Light Company; MYRON B. KATZ, NANCY RYLES, and RONALD EACHUS,

Defendants.

FRYE, Judge:

The following matters are before the court:

1) the motion for partial summary judgment of Columbia Steel Casting Co., Inc. (Columbia) (#72); and

2) the cross-motion for summary judgment of Portland General Electric Company (PGE) (#82).

UNDISPUTED FACTS

On July 18, 1972, PGE and Pacific Power & Light Company (Pacific) entered into an agreement to exchange electric distribution properties and customer accounts in certain defined areas within and around the City of Portland (the 1972 Agreement). The 1972 Agreement provides, in part:

> NOW, THEREFORE, in order to implement the elimination of said duplicating facilities and to comply with Ordinance 134416, it is agreed:
>
> 1. Exchange of Facilities
>
> (a) Pacific shall transfer and convey to Portland General and Portland General shall acquire from Pacific all the electric distribution plant, including distribution substations, poles, lines, transformers, meters, related distribution facilities, and all easements necessary for the operation thereof, owned, operated and maintained by Pacific in the area designated as Pacific's Rainier service district, shown on Exhibit A

and described in Exhibit C, and in the area designated as Parcel C, shown on exhibit A and described in Exhibit B; excluding, however: (1) facilities owned, operated and maintained by Pacific within an area commonly known as the Portland downtown core area, designated as Parcel D on Exhibit A, and described in Exhibit B, and (2) certain duct lines owned, operated and maintained by Pacific extending from Pacific's Albina substation to Pacific's facilities within the Portland downtown core area. Distribution substations to be conveyed by Pacific to Portland General are listed in "Exhibit D," attached hereto and made a part hereof.

(b) Portland General shall transfer and convey to Pacific and Pacific shall acquire from Portland General all of the electric distribution plant, including distribution substations, poles, lines, transformers, meters, related distribution facilities, and all easements necessary for the operation thereof, owned, operated and maintained by Portland General in the areas designated as Parcels A and B, shown on Exhibit A and described in Exhibit B; excluding, however: (1) facilities described under the streetlight plant account of the Uniform Systems of Account, except that leased area lights will be conveyed by Portland General to Pacific; (2) certain duct lines owned, operated and maintained by Portland General's facilities within the Portland downtown core area; and (3) standard wood poles used exclusively for street lighting.

Distribution substations to be conveyed by Portland General to Pacific are listed in Exhibit D.

. . . .

7. Transfer of Customer Accounts

> The transfer of customer accounts between Portland General and Pacific shall commence on July 24, 1972, and shall be coordinated so that the revenues from the sales of electricity of each company will remain substantially the same over the period required to accomplish transfer of all customers involved. At the time of such transfer, each party shall make available to the other a list of the transferred customers, together with accounting, billing, service and historical sales records relating thereto. On the date of the transfer of customer accounts, each party will render a final bill to those customers being transferred to the other party. Accounts receivable will be retained by the party issuing the final bill.

Exhibit K to Affidavit of L. Guy Marshall (Marshall Affidavit), pp. 2-3, 9.

The City of Portland had consented to the agreed exchange in Ordinance 134416 enacted on April 26, 1972, which states, in part:

> An Ordinance consenting to exchange of certain property within the City between Portland General Electric Company and Pacific Power & Light Company on certain conditions in order to permit reduction of poles and wires and duplication of facilities in various areas of the City.
>
> The City of Portland ordains:
>
> Section 1. The Council finds that both Portland General Electric Company and Pacific Power & Light Company operate electric power systems which serve patrons within the City, that both companies operate under non-exclusive franchises and that the obligation

> to supply properties within the City must remain binding upon both companies; that at the present time, however, in many areas of the City poles and wires are duplicated between the companies for service purposes which results in some areas in doubling the number of such poles and wires and appurtenances causing interference with view and some accidental breakage of such wires or poles, and additional investment which increases the rate bases upon which said companies are entitled to earn a profit; that to reduce the visual impact of duplicating facilities, to promote safety, to promote economy, to simplify subsequent undergrounding and to work toward the lowest possible rates for users within the City, an interchange of properties between the companies should be permitted as hereinafter set forth . . . now, therefore, the City does by this ordinance consent to the sale, transfer and exchange of plant and property between Portland General Electric and Pacific Power & Light Company as follows.

Exhibit J to Marshall Affidavit, p. 1

By Order #72-870 entered on December 15, 1972, the Public Utilities Commission (the PUC) concluded that:

> [T]he application of Pacific Power & Light Company and Portland General Electric Company should be granted and an order entered approving the transfer of certain exclusively served territory in the Rainier area from Pacific Power & Light Company to Portland General Electric Company and approving the transfer and exchanging of utility property and facilities and customers between the two companies as applied for. It is therefore
>
> ORDERED that the application of Pacific Power & Light Company to transfer certain of its exclusively

served area allocated to it and lying in and around Rainier, Oregon, to Portland General Electric Company is approved. Such assigned area is described as Parcel A in Appendix "A," attached hereto and made a part hereof; it is further

ORDERED that Pacific Power & Light Company may transfer to Portland General Electric Company all electric distribution plant, including distribution substations, poles, lines, transformers, meters, related distribution facilities situated within or used for providing utility service within the boundaries of Parcel A as described in Appendix "A," and within the boundaries of Parcel B described in Appendix "A," excepting and excluding such facilities within an area commonly known as the Portland downtown core . . . .

ORDERED that Portland General Electric Company may transfer to Pacific Power & Light Company all electric distribution plant, including distribution substations, poles, lines, transformers, meters, and related distribution facilities and all easements necessary for the operation thereof used for providing service in or lying within the boundaries of Parcels A and B, described in Appendix "B," attached hereto and made a part hereof, excluding however: (1) facilities described under the street light plant account of the Uniform Systems of Account, except that leased area lights will be conveyed by Portland General Electric Company to Pacific Power & Light Company; (2) certain duct lines owned, operated and maintained by Portland General Electric Company extending from Portland General Electric Company's Station "L" to Portland General Electric Company's facilities within the Portland downtown core area; and (3) standard wood poles used exclusively for street lighting; it is further

ORDERED that the real property necessarily incidental to the transmission and distribution substations and the fee interest in easements may be conveyed to the respective parties as provided by agreement between the companies; it is further

ORDERED that the manner and method for accomplishing the transfer and exchange of property, facilities and customers, and the terms and conditions governing this transfer, shall be as provided by that agreement between the companies therein, dated July 18, 1972.

Exhibit O to Marshall Affidavit, pp. 8-9.

At the time the 1972 Agreement was signed, Columbia was a customer of PGE and continues to purchase electricity from PGE pursuant to an Agreement for Electric Power Service (PGE Agreement), which is automatically renewed on a yearly basis unless and until one party provides timely written notice of termination to the other party.

The electric rates for the industrial customers of Pacific are less than the electric rates for the industrial customers of PGE. Pacific owns a transmission line that crosses the plant site of Columbia.

Columbia and Pacific entered into negotiations in 1990 aimed at having Pacific, rather than PGE, furnish electricity to the plant site of Columbia. In April, 1990, Pacific notified Columbia that it would offer Columbia an electric power contract. PGE thereafter notified Columbia that, Pacific could not lawfully furnish electricity to Columbia because, in PGE's opinion, service by Pacific to Columbia would constitute a breach of the 1972 Agreement.

On May 30, 1990, Columbia advised PGE that because PGE had announced that it might seek, through litigation, to prevent Pacific from providing electricity to Columbia, Pacific had not constructed a substation necessary to supply Columbia with alternate electrical service. In the letter, Columbia

requested PGE to deliver electricity to Columbia as of 12:00:01 a.m. July 1, 1990 and until the resolution of this litigation. In a letter to Columbia dated May 30, 1990, PGE stated its position, which was that Columbia was within the exclusive service territory of PGE, and therefore must purchase electricity from PGE.

On May 30, 1990, Pacific filed an action, Civil No. 90-524-FR, against PGE, Columbia and PUC for a judicial declaration of the rights and obligations of the parties under the PGE Agreement, the 1972 Agreement, and the Sherman Antitrust Act.

On June 19, 1990, Columbia filed a related action against PGE, Pacific and PUC (Civil No. 90-592-FR), which was thereafter consolidated with Civil No. 90-524-FR, seeking a judicial declaration that Columbia may terminate the PGE Agreement and take service from Pacific; that PGE does not have an exclusive right to serve Columbia under the terms of the 1972 Agreement; that the Portland City Charter, the state utility laws, and the Portland franchise agreements permit Pacific to serve Columbia; and that Order #72-870 of the PUC neither empowers or authorizes PGE to monopolize electric service to Columbia, nor serves to foreclose Pacific from providing electrical service to Columbia.

In an Opinion and Order filed October 11, 1990, this court stayed all discovery upon the motions of Pacific and Columbia except as necessary "to resolve the issues relating to the claim of [PGE] that it has the exclusive right to provide electric services to [Columbia] and whether there is a legal defense to the regular and ordinary application of the antitrust laws." Opinion and Order, p. 4.

Pacific subsequently moved for voluntary dismissal of the initial action, Civil No. 90-524-FR, pursuant to Fed. R. Civ. P. 41(a)(2) on the grounds that Pacific and PGE resolved the issues in that action by executing a settlement agreement. The motion was granted, and the initial action has been dismissed.

Columbia now moves the court for an order granting a partial summary judgment in its favor and for a declaration as follows: 1) that PGE does not have an exclusive right to

furnish electricity to Columbia; 2) that Columbia has a right to seek electric power service from Pacific; and 3) that Order #72-870 of the PUC neither empowers or authorizes PGE to monopolize the service of electric power to Columbia, nor does it serve to foreclose Pacific from providing electric power to Columbia.

CONTENTIONS OF COLUMBIA

Columbia contends that the 1972 Agreement doest not provide for the allocation of exclusive service territories within and around the City of Portland, and that the order of the PUC does not approve the allocation of exclusive service territories. Columbia further contends that the allocation of exclusive territories is unlawful in the City of Portland because the City of Portland has prohibited territorial allocations in its City Charter. Columbia argues that O.R.S. 758.470(1) bars the PUC from granting applications for territorial allocations in the City of Portland because it states that "ORS . . . 758.400 to 758.475 shall not be construed or applied to restrict the powers granted to cities to issue franchises."

Columbia further contends that the language of the 1972 Agreement provides only for the transfer of equipment, facilities, certain property, and customer accounts, but does not provide for the allocation in perpetuity of exclusive service territories. Columbia points out that the language of the 1972 Agreement does not contain the terms "territorial allocation," "exclusive service territory," or any other terms which can be interpreted to constitute an intent of the parties to provide for territorial allocations under O.R.S. 758.410 (1).

Columbia relies upon the language of the 1972 Agreement, the prior city ordinance, and the subsequent order of the PUC, which consistently refer to the 1972 Agreement as an "exchange" of properties or a "transfer" of facilities and customer accounts. Columbia argues that the use of these terms is significant in that the transfer of facilities was subject to the approval of the PUC under O.R.S. 757.480 et seq., while the creation of exclusive service territories is subject to approval of

the PUC under O.R.S. 758.425(1).

Columbia points out that in their application to the PUC in 1972, PGE and Pacific sought approval only to exchange electric utility properties, service facilities, and customers under Chapter 757 of the Oregon Revised Statutes and did not seek approval of exclusive service territories under Chapter 758 of the Oregon Revised Statutes. Columbia argues that the absence of any reference in the order of the PUC to the statutes governing the creation of new territorial allocations as provided in O.R.S. 758.410(1) was not an oversight by the PUC.

Columbia asserts that the failure of PGE and Pacific to make any reference to chapter 758 in their application to the PUC forecloses the Commissioner of the PUC from making any territorial allocation under Chapter 758 because the necessary procedural rules of the PUC which were in effect in 1972 provided that any application must "state clearly and concisely the authorization or permission sought, [and] shall cite by appropriate reference the statutory provision or other authority under which the Commissioner's action is sought." Exhibit Q to Marshall Affidavit, p. 1 (Former OAR 860-13-025).

Columbia points out that PGE and the PUC had explicitly provided for the allocation of territories in agreements reached prior to the 1972 Agreement by using terms such as "allocation of service territories and customers between them." See, e.g., Agreement between City of Cascade Locks and PGE (Exhibit T to Marshall Affidavit); Agreement between Consumers Power, Inc. and PGE (Exhibit CC to Declaration of Eric R. Todderud (Todderud Declaration)); Agreement between West Oregon Electric Coop, Inc. and PGE (Exhibit DD to Todderud Declaration); and Agreement between Tillamook County People's Utility District and PGE (Exhibit EE to Todderud Declaration). The Agreement between West Oregon Electric Coop, Inc. and PGE signed on February 26, 1962, for example, states, in part:

> Whereas, the Coop and the Company each desire to prevent duplication of electric utility facilities within the territory hereinafter described by the allocation of

> service territories and customers between them, and by limiting the right of each to extend electric power distribution lines within the boundaries hereinafter established.

Exhibit DD to Todderud Declaration, p.1. Columbia contrasts the language in the 1972 Agreement which states: "WHEREAS, Portland General and Pacific wish to provide for the elimination of duplicating electric facilities in the foregoing areas." Exhibit K to Marshall Affidavit, p.1.

Columbia contends that the doctrine of state action does not permit this court to insert into the 1972 Agreement and the order of the PUC essential, but missing, terms. Columbia argues that the order of the PUC which provides for the limited exchange of facilities and customers is not a grant of a perpetual and exclusive monopoly because the application submitted by PGE and Pacific did not ask for the authority to monopolize the supply of power in an area which had previously been subject to competition.

In the event that the court concludes that an exclusive territorial allocation exists, Columbia contends that this territorial allocation is invalid because it violates the Sherman Antitrust Act. Columbia argues that the doctrine of state action does not immunize PGE from federal antitrust liability because the State of Oregon has not clearly articulated a policy to displace competition for electric service customers in the City of Portland, and the laws of the State of Oregon do not provide for the active supervision of the displacement of competition under territorial allocation statutes.

CONTENTIONS OF PGE

PGE has filed a cross-motion for summary judgment in its favor seeking an order of the court declaring 1) that the 1972 Agreement between Pacific and PGE, as approved by PUC Order #72-870, lawfully allocates service territory in the City of Portland; 2) that PGE has an exclusive right to serve Columbia and any other customer within the geographic

territory allocated to it in the 1972 Agreement as approved by the order of the PUC; and 3) that PGE is immune from antitrust liability with respect to the 1972 Agreement.

PGE argues that the statutes providing for territorial allocation do not require the words "exclusive territorial allocation' or other similar words be used in the 1972 Agreement. PGE argues that the 1972 Agreement is, in fact, a contract as contemplated by O.R.S. 758.410(1) which allocates exclusive service territories. PGE argues that the 1972 Agreement is a lawful contract between two businesses who provide similar utility services. PGE argues that the 1972 Agreement is a contract for the purpose of allocating territories because the explicit purpose of the contract is to draw boundaries of service areas, and because the parties declare in the 1972 Agreement itself that they want to eliminate the duplication of services in those territories whose boundaries they have drawn. PGE contends that the 1972 Agreement specifically covers the allocation of customers in Section 7 and designates "which territories and customers are to be served by which of said contracting parties." O.R.S. 758.410(1).

PGE argues that the signators to the 1972 Agreement and all others involved, including the PUC, intended that the 1972 Agreement create exclusive service territories. PGE asserts that any question over the failure to expressly use the terms "exclusive service area" arose because the agreement was written by engineers and executives and not by lawyers.

PGE asserts that the creation of exclusive service territories does not conflict with the Charter of the City of Portland. PGE further asserts that the doctrine of state action immunizes the creation of exclusive service territories in the State of Oregon from the confines of the federal antitrust laws because the restraint shown here has been clearly articulated and affirmatively expressed as the policy of the State of Oregon by the PUC; that the order of the PUC approves the territorial allocation of the City of Portland; and that the laws of the State of Oregon provide for the active supervision of territorial allocations such as this one.

PGE admits that it was an oversight not to refer to Chapter 758 in the application that was made to the PUC for the territorial allocations, but argues that it was a technical defect that should be overlooked by the court. PGE explains that the reference to Chapter 757 may have been caused by the renumbering of Chapter 757 and 758 which occurred about that time. In any case, PGE contends that the requirement that the appropriate statutory reference be cited to the PUC is a rule of the PUC and has not been imposed by the legislature. PGE contends that the PUC did not find the defect significant in that it exercised jurisdiction over the transfer of customers which is authorized by Chapter 758 despite the fact that the statute was not properly identified in the application. PGE argues that notwithstanding the proceedings before the PUC, these proceedings were in substance conducted under Chapter 758 despite the defect in label.

POSITION OF THE PUC

The PUC takes no position on the motion for summary judgment filed by Columbia, but submits a memorandum which states the following three positions which are contrary to the arguments made by Columbia: 1) statutes relating to territorial allocation apply to the City of Portland ; 2) one of the purposes of the statutes relating to territorial allocation is to displace competition statewide; and 3) the laws of the State of Oregon allow for the active supervision of the displacement of competition under territorial allocation statutes.

APPLICABLE STANDARD

Summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The initial burden is on the moving party to point out the absence of any genuine issue of material fact. Once the initial burden is satisfied, the burden shifts to the opponent to demonstrate through the production of probative evidence that

there remains as issue of fact to be tried. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). On a motion for summary judgment, all reasonable doubt as to the existence of a genuine issue of fact should be resolved against the moving party. Hector v. Wiens, 533 F.2d 429, 432 (9th Cir. 1976).

ANALYSIS

In Parker v. Brown, 317 U.S. 341, 351 (1943), the United States Supreme Court declared that there was "no hint that [the Sherman Act] was intended to restrain state action or official action directed by a state." In California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980), the Court explained that its decisions "establish two standards for anti-trust immunity under Parker v. Brown. First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." (Citations omitted).

The Oregon Legislature, in enacting O.R.S. 758.400 to 758.475, has provided for the allocation of territories and customers or utilities providers. O.R.S. 758.405 states the legislative purpose for enacting statutes that provide for the allocation of territories and customers of utilities providers as follows:

> The elimination and future prevention of duplication of utility facilities is a matter of state-wide concern; and in order to promote the efficient and economic use and development and the safety of operation of utility services while providing adequate and reasonable service to all territories and customers affected thereby, it is necessary to regulate in the manner provided in ORS 758.400 to 758.475 all persons and entities providing utility services.[1]

---

[1] The purpose of the Oregon legislature in enacting these statutes was to address a statewide issue. O.R.S. 470.470(1) preserves the right of a city to exercise its franchise power to say "yes" or "no" to a utility

O.R.S. 758.410, which is applicable to the facts of this case, provides, in relevant part, as follows:

> (1) Any person providing a utility service may contract with any other person providing a similar utility service for the purpose of allocating territories and customers between the parties and designating which territories and customers are to be served by which of said contracting parties; and the territories and customers so allocated and designated may include all or any portion of the territories and customers which are being served by either or both of the parties at the time the contract is entered into, or which could economically served by then existing facilities of either party, or by reasonable and economic extensions thereto.

O.R.S. 758.400 to 758.475 articulate the policy of the State of Oregon to remove market competition as the basis for determining the customers of the providers of electricity. The PUC closely supervises compliance with these statutes and with the policy of the State of Oregon. To the extent that a public utility provider obtains a lawful and valid contract for the allocation of territories and customers through the provisions of the territorial allocation statutes, O.R.S. 758.400 to 758.475, that provider is immune from antitrust violations.

The difficult issue presented by this case is whether the 1972 Agreement was "for the purpose of allocating territories and customers between the parties and designating which territories and customers are to be served by which of said contracting parties" as provided in O.R.S. 758.410(1).

O.R.S. 758.400(1) states that "'[a]llocated territory' means an area with boundaries established by a contract between persons furnishing a similar utility service and approved by the

---

company seeking permission to operate within the city. There is no basis for this court to conclude that the provisions of O.R.S. 758.400 to 758.475 do not apply to utilities lawfully operating within the City of Portland.

commission or established by an order of the commission approving an application for the allocation of territory." In order to lawfully displace competition as the method of allocating customers for electric service in a particular area, utility companies must enter into a contract which allocates service territories and designates service to customers, and the utility companies must make application to and receive an order from the PUC approving and establishing the allocation of these territories. These requirements must be met in order to receive the immunity which is provided by the state statutory scheme from the federal antitrust laws.

PGE relies on the fact that the 1972 Agreement and the order of the PUC each state that the elimination of duplicate electrical facilities is the purpose behind the exchange of facilities. The 1972 Agreement states in the initial preamble: "WHEREAS, Portland General and Pacific wish to provide for the elimination of duplicating electric utility facilities in the foregoing areas." Exhibit K to Marshall Affidavit, p. 1. The order of the PUC explains:

> In the Portland areas affected by the transfer, both Portland General and Pacific have service extensions scattered throughout such areas. Both utilities have transmission and distribution facilities running throughout the area, often side by side or on the same poles. The individual facilities of either company are generally sufficient now or with minor modification to serve all customers in the area independently. Elimination of duplicating facilities will allow a more efficient and economical use of the respective companies' utility facilities.

Exhibit O to Marshall Affidavit, p. 3.

The state statutes require, however, that the allocation of territory must be "established by an order of the commission approving an application for the allocation of territory." O.R.S. 758.400(1). The order of the PUC relevant to this action states

initially that "[o]n August 8, 1972, the Commissioner accepted for filing a joint application by [Pacific] and [PGE] for an order or orders approving and authorizing . . . [t]he exchange of electric utility property and service facilities located in Multnomah and Columbia Counties." Exhibit O to Marshall Affidavit, p.2. The conclusion of the PUC order provides, in relevant part, that:

> Pacific Power & Light Company may transfer to Portland General Electric Company all electric distribution plant . . . within the boundaries of Parcel A . . . and within the boundaries of Parcel B . . . and that Portland General Electric Company may transfer to Pacific Power & Light Company all electric distribution plant . . . within the boundaries of Parcels A and B.

Exhibit O to Marshall Affidavit, p.8 (emphasis added).

The order of the PUC authorized the "exchange of electric utility property and service facilities" within the parcels of land indicated. The order of the PUC reflects the fact that the parties agreed in the 1972 Agreement only to an exchange of facilities within the area relevant to this action. the 1972 Agreement was not a contract whereby the parties allocated territories and customers within those areas for the provision of exclusive services and limited their rights to operate within the parcels in the future. The order of the PUC did not order the allocation of territories and customers and did not designate which territory was to be served by which contracting party.

The purpose of the doctrine of state action was to allow a state to authorize certain acts not otherwise open to private parties. It would be contrary to the purpose of the doctrine of state action to allow private parties to claim monopolies that have not been specifically and clearly authorized by relevant statutory process.

CONCLUSION

The court concludes that Columbia is entitled to a declaration that Order #72-870 of the PUC neither empowers nor authorizes PGE to monopolize the service of electric power to Columbia.

The motion for partial summary judgment of Columbia (#72) is granted. The cross-motion for summary judgment of PGE (#82) is denied.

DATED this 3 day of July, 1991.

/s/_____

HELEN J. FRYE
United States District Judge

APPENDIX F

APPENDIX F

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

COLUMBIA STEEL CASTING CO., INC., an Oregon corporation,	)	
Plaintiff,	)	
v.	)	Civil No. 90-524-FR (LEAD) Civil No. 90-592-FR
PORTLAND GENERAL ELECTRIC COMPANY, an Oregon corporation; PACIFICORP, doing business as Pacific Power & Light Company; MYRON B. KATZ, JOAN SMITH, and RONALD EACHUS,	)	O P I N I O N [Entered February 9, 1993]
Defendants.	)	

FRYE, Judge:

The matters before the court are 1) the motion of defendant Portland General Electric Company (PGE) for summary judgment (#262); and 2) the cross-motion of plaintiff, Columbia Steel Casting Co., Inc. (Columbia Steel), for summary judgment (#269).

FACTS

On July 18, 1972, PGE and Pacific Power & Light Company (PP&L) entered into an agreement to exchange electrical distribution properties and customer accounts in certain defined areas within and around the City of Portland (the 1972 Agreement). The 1972 Agreement provides, in part:

> NOW, THEREFORE, in order to implement the elimination of said duplicating facilities and to comply with Ordinance 134416, it is agreed:
>
> 1. Exchange of Facilities
>
> (a) Pacific shall transfer and convey to Portland General and Portland General shall acquire from Pacific all the electric distribution plant, including distribution substations, poles, lines, transformers, meters, related distribution facilities, and all easements necessary for the operation thereof, owned, operated and maintained by Pacific in the area designated as Pacific's Rainier service district, shown on Exhibit A and described in Exhibit C, and in the area designated as Parcel C, shown on exhibit A and described in Exhibit B; excluding, however: (1) facilities owned, operated and maintained by Pacific within an area commonly known as the Portland downtown core area, designated as Parcel D on Exhibit A, and described in Exhibit B, and (2) certain duct lines owned, operated and maintained by Pacific extending from Pacific's Albina substation to Pacific's facilities within the Portland downtown core area. Distribution substations to be conveyed by Pacific to Portland General are listed in "Exhibit D," attached hereto and made a part hereof.
>
> (b) Portland General shall transfer and convey to Pacific and Pacific shall acquire from

Portland General all of the electric distribution plant, including distribution substations, poles, lines, transformers, meters, related distribution facilities, and all easements necessary for the operation thereof, owned, operated and maintained by Portland General in the areas designated as Parcels A and B, shown on Exhibit A and described in Exhibit B; excluding, however: (1) facilities described under the streetlight plant account of the Uniform Systems of Account, except that leased area lights will be conveyed by Portland General to Pacific; (2) certain duct lines owned, operated and maintained by Portland General's Station L to Portland General's facilities within the Portland downtown core area; and (3) standard wood poles used exclusively for street lighting.

Distribution substations to be conveyed by Portland General to Pacific are listed in Exhibit D.

. . . .

7. Transfer of Customer Accounts

The transfer of customer accounts between Portland General and Pacific shall commence on July 24, 1972, and shall be coordinated so that the revenues from the sales of electricity of each company will remain substantially the same over the period required to accomplish transfer of all customers involved. At the time of such transfer, each party shall make available to the other a list of the transferred customers, together with accounting, billing, service and historical sales records relating thereto. On the date of the transfer of customer accounts, each party will render a final bill to those customers being transferred to the other party. Accounts receivable will be retained by the party issuing the final bill.

Exhibit K to Affidavit of L. Guy Marshall (Marshall Affidavit), pp. 2-3, 9.

Prior to the time that PGE and PP&L entered into the 1972 Agreement, The City of Portland had consented to the agreed exchange of electrical distribution properties and customer accounts in Ordinance 134416 enacted on April 26, 1972. That ordinance provides, in part:

> An Ordinance consenting to exchange of certain property within the City between Portland General Electric Company and Pacific Power & Light Company on certain conditions in order to permit reduction of poles and wires and duplication of facilities in various areas of the City.
>
> The City of Portland ordains:
>
> Section 1. The Council finds that both Portland General Electric Company and Pacific Power & Light Company operate electric power systems which serve patrons within the City, that both companies operate under non-exclusive franchises and that the obligation to supply properties within the City must remain binding upon both companies; that at the present time, however, in many areas of the City poles and wires are duplicated between the companies for service purposes which results in some areas in doubling the number of such poles and wires and appurtenances causing interference with view and some accidental breakage of such wires or poles, and additional investment which increases the rate bases upon which said companies are entitled to earn a profit; that to reduce the visual impact of duplicating facilities, to promote safety, to promote economy, to simplify subsequent undergrounding and to work toward the lowest possible rates for users within the City, an

> interchange of properties between the companies should be permitted as hereinafter set forth . . . now, therefore, the City does by this ordinance consent to the sale, transfer and exchange of plant and property between Portland General Electric and Pacific Power & Light Company as follows.

Exhibit J to Marshall Affidavit, p. 1

In Order No. 72-870 entered on December 15, 1972, the Oregon Public Utilities Commission (the OPUC) approved the exchange of electrical distribution properties and customer accounts entered into by PGE and PP&L:

> [T]he application of Pacific Power & Light Company and Portland General Electric Company should be granted and an order entered approving the transfer of certain exclusively served territory in the Rainier area from Pacific Power & Light Company to Portland General Electric Company and approving the transfer and exchanging of utility property and facilities and customers between the two companies as applied for. It is therefore
>
> ORDERED that the application of Pacific Power & Light Company to transfer certain of its exclusively served area allocated to it and lying in and around Rainier, Oregon, to Portland General Electric Company is approved. Such assigned area is described as Parcel A in Appendix "A," attached hereto and made a part hereof; it is further
>
> ORDERED that Pacific Power & Light Company may transfer to Portland General Electric Company all electric distribution plant, including distribution substations, poles, lines, transformers, meters, related distribution facilities situated within or used for providing utility service within the

boundaries of Parcel A as described in Appendix "A," and within the boundaries of Parcel B described in Appendix "A," excepting and excluding such facilities within an area commonly known as the Portland downtown core area . . ..

ORDERED that Portland General Electric Company may transfer to Pacific Power & Light Company all electric distribution plant, including distribution substations, poles, lines, transformers, meters, and related distribution facilities and all easements necessary for the operation thereof used for providing service in or lying within the boundaries of Parcels A and B, described in Appendix "B," attached hereto and made a part hereof, excluding however: (1) facilities described under the street light plant account of the Uniform Systems of Account, except that leased area lights will be conveyed by Portland General Electric Company to Pacific Power & Light Company; (2) certain duct lines owned, operated and maintained by Portland General Electric Company extending from Portland General Electric Company's Station "L" to Portland General Electric Company's facilities within the Portland downtown core area; and (3) standard wood poles used exclusively for street lighting; it is further

ORDERED that the real property necessarily incidental to the transmission and distribution substations and the fee interest in easements may be conveyed to the respective parties as provided by agreement between the companies; it is further

ORDERED that the manner and method for accomplishing the transfer and exchange of property, facilities and customers, and the terms and conditions governing this transfer, shall be as provided by that

agreement between the companies therein, dated July 18, 1972.

Exhibit O to Marshall Affidavit, pp. 8-9.

The 1972 Agreement was negotiated by a team of employees from PP&L and PGE, all of whom testified in depositions taken in this action that, in their opinions, the purpose of the 1972 Agreement was to establish secure and exclusive service territories within the City of Portland.

At the time that the 1972 Agreement was signed, Columbia Steel purchased electricity from PGE pursuant to an Agreement for Electric Power Service. The Agreement for Electric Power Service is a contract which is automatically renewed on a yearly basis unless and until one party provides to the other party timely written notice of the termination of the agreement. In 1980, Columbia Steel and PGE renewed the agreement for a five-year period, with an option to either party thereafter to renew the agreement on a yearly basis or to terminate the agreement on July 1 of any given year, so long as thirty days notice is provided by the terminating party to the other party.

In the years since the parties signed the 1972 Agreement, PGE has acted consistently with its stated belief that it had the exclusive right to serve the City of Portland within which Columbia Steel was located.

In the years after the 1972 Agreement was signed and after the OPUC issued Order No. 72-870, the OPUC has acted to prevent PGE from duplicating distribution facilities in the territory serviced by PP&L, and vice versa, with the intended effect of eliminating competition in the provision of electric services in the territories which were the subject of the transfer of electrical distribution properties and customer accounts in the 1972 Agreement.

PGE sets only those rates and offers only those electric services that are contained in tariffs approved by OPUC. PGE files the desired rates with the OPUC, but the OPUC sets the rates. The retail rates charged by PGE for electric services and the electric services provided by PGE between 1972 and the

present have been approved by the OPUC. Furthermore, PGE must receive prior approval from the OPUC before it can transfer a customer to another provider of electrical services.

For several years after 1972, there was no significant differences in the rates charged by PGE and PP&L for electric services. Therefore, customers had no incentive to seek to change providers. In the 1980's, the rates that PP&L charged its industrial customers were lower than the rates PGE charged its industrial customers. The rates that PP&L charges today are lower than the rates PGE charges. In the 1980's, Columbia Steel began to examine the possibility of obtaining electrical services from a source other than PGE.

In February, 1987, Columbia Steel requested PP&L to provide electric services to it. PP&L contacted PGE to discuss the matter. Columbia Steel made a number of telephone calls to PP&L and was ultimately told that the territories had been divided up and PP&L did not serve the territory in which Columbia Steel was located.

In 1987, Columbia Steel learned of the possibility of becoming the assignee of a direct service, industrial power supply contract between the Bonneville Power Administration (BPA) and Pacific Carbide and Alloys Company. PGE stated its opposition to the assignment of the industrial power supply contract between the BPA and Pacific Carbide and Alloys Company to Columbia Steel. The BPA concluded that it would not be in the best interest of the BPA to facilitate the request of Columbia Steel.

In late 1989, Columbia Steel again requested PP&L to provide electric services to Columbia Steel. PP&L examined the request and decided it would consider the request of Columbia Steel. PP&L then informed PGE that PP&L would make an offer to provide electric services to Columbia Steel.

In 1990, Columbia Steel and PP&L entered into negotiations, the goal of which was to have PP&L, rather than PGE, furnish electric services to Columbia Steel. In April, 1990, PP&L notified Columbia Steel that it would offer Columbia Steel an electrical power contract. PGE continued to

oppose efforts by Columbia Steel to change the supplier of electric services from PGE to PP&L.

On May 30, 1990, legal counsel for Columbia Steel wrote the following letter to the senior vice president and general counsel for PGE:

> On behalf of my client, Columbia Steel Casting Company, Inc. (Columbia), this letter is to request that Portland General Electric Company (PGE) begin the transfer of power delivered by Pacific Power & Light Company (Pacific) to PGE for service to Columbia beginning at 12:00:01 a.m. on July 1, 1990.
>
> As you know, Pacific has concluded that it must respond affirmatively to Columbia's request that it begin power sales to Columbia upon the expiration of its power sales contract with PGE on July 1, 1990. Pacific has promised to begin power sales upon the execution of a power sales contract. PGE has announced that it may seek to prevent such deliveries through litigation. Due to PGE's continuing assertion of the exclusive right to serve Columbia, Pacific has not heretofore constructed a substation in the vicinity of Columbia's plant. [Pacific] therefore will not be in a position to begin deliveries on July 1, 1990, absent access to PGE's transformers and conductor facilities serving Columbia's plant.
>
> If Columbia is right in its view that the OPUC's 1972 Order did not serve to lawfully divided PGE and Pacific's service territories, then Columbia could be incurring additional damages (and PGE could be incurring additional anti-trust liability) while Columbia is unable to take delivery of the power that Pacific has offered to deliver.

> Since the PGE facilities that are needed to serve Columbia have surplus capacity, PGE will not be required to disadvantage its own customers to provide access to these facilities.
>
> If PGE is confident of its legal position, it would seem prudent to have PGE continue energy deliveries (albeit Pacific's power) over its facilities, pending a judicial resolution of this dispute. Columbia and Pacific are prepared to enter into an agreement with PGE to pay PGE lost margins if PGE prevails. If Columbia should prevail in the litigation, then Pacific would build a substation and begin to provide service to Columbia directly over Pacific's own facilities.
>
> Please let me know as soon as possible the means by which temporary delivery of power can take place over PGE's facilities. As you know, the "evergreen" provisions of PGE's power sales contract with Columbia require Columbia to provide 30 days advance notice in writing to terminate the contract on the anniversary date. By my calculation, Columbia must provide such notice to PGE on or before May 31, 1990.

Exhibit 55 to the Affidavit of Allan M. Garten, pp. 1-2.

On the same date, May 30, 1990, legal counsel for PGE wrote back to legal counsel for Columbia Steel as follows:

> Leonard Girard [Vice President and General Counsel of PGE] asked us to respond to your letter of May 30, 1990. We do not read your letter as a termination of any contract rights by your client, Columbia Steel Casting Company, Inc. If we are incorrect in that respect, please notify Portland General Electric Company ("PGE"). Your client is

> within PGE's exclusive service territory. If it desires to purchase electricity, it must do so from PGE - either pursuant to contract or PGE's Schedule 32 Tariffs.

Id. at 3.

On the same date, legal counsel for Columbia Steel responded to legal counsel for PGE, in relevant part, as follows:

> I have received your letter of May 30, 1990. You are correct that my letter to Leonard Girard did not serve as a termination of the Columbia Steel/Portland General Electric Company (PGE) contract. Columbia reserves the right to provide a future notice of termination under the terms of its contract with PGE. We are still hopeful of some amicable resolution of this matter.

Id. at 4.

On May 31, 1990, PP&L filed an action in this court, Civil No. 90-524-FR, seeking a judicial declaration of the rights and obligations of PGE, Columbia Steel, and the OPUC under the 1972 Agreement and the Sherman Antitrust Act.

On June 19, 1990, Columbia Steel filed this action, Civil No. 90-592-FR, against PGE, PP&L and OPUC seeking a judicial declaration that Columbia Steel may terminate its agreement with PGE and purchase electric services from PP&L; that PGE does not have an exclusive right to serve Columbia Steel under the terms of the 1972 Agreement; and that the Order No. 72-870 of the OPUC neither empowers nor authorizes PGE to monopolize the sales of electric services to Columbia Steel nor serves to foreclose PP&L from providing electric services to Columbia Steel.

On July 2, 1990, PGE filed a three-part application with the OPUC asking the OPUC to 1) issue a declaratory order affirming that Order No. 72-870 of the OPUC, which was

issued on December 15, 1972, allocates exclusive territory to PGE in the City of Portland; 2) issue an order approving a 1972 Agreement between PGE and PP&L which allocates certain territory in the City of Portland to PGE; and 3) allocate certain territory in the City of Portland to PGE on the basis of the years of continuous service that PGE had provided electric services to that territory pursuant to O.R.S. 758.435.

On July 25, 1990, City of Portland and PP&L executed a contract, under the terms of which PP&L was to provide electric services to Columbia Steel.

On May 2, 1991, PGE and PP&L entered into a settlement agreement, in which PGE agreed to transfer the electric services provided by PP&L to Columbia Steel through the facilities of PGE for a period not to exceed twenty-eight months. The transfer of Columbia Steel as a consumer of electric services from PGE to PP&L was a part of a settlement agreement between PGE and PP&L in Civil No. 90-524-FR, which had been filed by PP&L. The settlement agreement provided for transfer by PP&L to PGE of property of equal value to the revenues likely to be produced from PP&L's sale of electric services to Columbia Steel. The settlement agreement was approved by the OPUC after the OPUC assured itself that there would not be a duplication of facilities.

Since July, 1991, Columbia Steel has purchased electric services from PP&L, but the electric services have been delivered by PGE.

On July 3, 1991, this court issued an Opinion and Order finding that Columbia Steel was entitled to a declaration tat Order No. 72-870 of the OPUC neither empowers nor authorizes PGE to monopolize the service of electric power to Columbia Steel. *Pacificorp v. Portland Gen. Elec. Co.*, 770 F. Supp. 562, 571 (D. Or. 1991) (*Pacificorp*).

In *Pacificorp*, this court found that PGE and PP&L had entered into an agreement to exchange electric distribution properties and customer accounts in certain defined areas within and around the City of Portland (the 1972 Agreement); that the 1972 Agreement was not a contract whereby the parties allocated territories and customers within those areas for the

provision of exclusive services and was not a contract that limits their rights to operate within certain areas in the future; and Order No. 72-870 of the OPUC did not order the allocation of territories and customers and did not designate which territory was to be served by which contracting party.

On April 16, 1992, the OPUC issued Order No. 92-557, which stated:

> because Order No. 72-870 did not expressly refer to ORS Chapter 758 with respect to future service in Portland under the allocation statutes and because the order did not say that exclusive territorial allocations are being created in Portland, Order No. 72-870, perhaps it did not unambiguously allocate exclusive service territories to PGE and PP&L. However, the order did create boundaries that the utilities observed as if they were allocated territories until Columbia Steel's attempt to switch in 1989. The Commission made the required statutory findings to allocate exclusive service territories and acted as if it had approved a territorial allocation in its 1972 order. The behavior of the utilities and the Commission demonstrates an understanding that exclusive service territories had been created.
>
> For the foregoing reasons, it appears to the Commission that Order No. 72-870 is not a complete and accurate memorial of the 1972 decision of the Commissioner in docket No. UF 2947: the order omits a reference to the statute under which its findings were actually made when the Commissioner approved the PGE/PP&L contract. Pursuant to ORS 756.568, the Commission will amend Order No. 72-870, nunc pro tunc, to conform to the actual decision intended and followed.

Order No. 92-557 of the OPUC, pp. 14-15.

The OPUC then ordered that:

1. Order No. 72-870 is hereby corrected by striking the following paragraph from page eight;

> "From the foregoing, it is concluded that the application of Pacific Power & Light Company and Portland General Electric should be granted and an order entered approving the transfer of certain exclusively served territory in the Rainier area from Pacific Power & Light Company to Portland General Electric Company and approving the transfer and exchanging of utility property and facilities and customers between the two companies as applied for. It is therefore"

and substituting the following language:

> "From the foregoing, it is concluded that the applications of Pacific Power & Light Company and Portland General Electric Company should be granted, and an order entered as follows:
>
> 1. Under ORS 758.460, approving the transfer of certain exclusively served territory in the Rainier area from Pacific Power & Light Company to Portland General Electric Company;

> 2. Under ORS 758.425, approving the agreement of the companies, which separates service territories and transfers affected customers; and
>
> 3. Under ORS 757.480, approving the exchange of assets and facilities to implement these transactions. It is therefore"
>
> 2. The correction to Order No. 72-870 is hereby entered nunc pro tunc as of December 15, 1972, the date when the decision was originally made and entered.

Id. at 20-21.

On June 29, 1992, this denied the motion of PGE for reconsideration. PGE had argued that this court should reconsider and vacate that portion of its Opinion and Order of July 3, 1991 in which it found that exclusive service territories were not created by the OPUC in 1972. PGE had argues that it was entitled to summary judgment in its favor on the grounds of its defense of immunity under the doctrine of state action immunity even if there were ambiguities in order No. 72-870 of the OPUC.

On June 29, 1991, this court denied the motion of PGE for reconsideration. The court concluded that Order No. 92-557 filed by the OPUC on April 16, 1992 does not alter the fact that the claim of PGE to a monopoly was not specifically and clearly authorized in July, 1991 when this court decided that Columbia Steel was entitled to a declaration that Order No. 72-870 of the OPUC neither empowered nor authorized PGE to monopolize the service of electrical power to Columbia Steel.

CONTENTIONS OF PGE

PGE contends that it is entitled to an order of summary judgment in its favor on the grounds that 1) when the 1972

Agreement was approved by the OPUC, it eliminated further competition between PGE and PP&L for existing customers in the City of Portland; 2) after the 1972 Agreement divided the City of Portland into two distinct areas and the duplication of facilities was eliminated, regulatory policy and practice prohibited subsequent competition between PGE and PP&L for existing customers; 3) PGE did not monopolize the service of electric power to Columbia Steel because it did not exclude all competition or control prices; 4) PGE never attempted to conceal its position that it had an exclusive service territory, and Columbia Steel was on constructive, if not actual, notice of the position of PGE; and 5) Columbia Steel has suffered no damages.

CONTENTIONS OF COLUMBIA STEEL

Columbia Steel contends that it is entitled to an order of summary judgment in its favor on the grounds that 1) PGE conspired with others to commit a per se violation of the antitrust laws by the implementation of the 1972 Agreement; 2) PGE monopolized power in the relevant market in violation of antitrust laws; 3) Columbia Steel was damaged by the unlawful monopolization of power by PGE; 4) the statute of limitations does not bar the claims of Columbia Steel because of the fraudulent concealment by PGE; 5) the interactions of PGE with state regulators does not afford a defense to the antitrust law violations; and 6) the rate cases and Order No. 92-557 of the OPUC which are relied upon by PGE do not stop Columbia Steel from proceeding in this case.

APPLICABLE STANDARD

Summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The initial burden is on the moving party to point out the absence of any genuine issue of material fact.

Once the initial burden of the moving party is satisfied, the burden shifts to the opponent to demonstrate through the production of probative evidence that there remains an issue of fact to be tried. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The non-moving party must make a sufficient showing on all essential elements of the case with resect to which the non-moving party has the burden of proof. *Id.*

The decision faced by the court is essentially the same decision faced by a court on a motion for a directed verdict -- that is, whether the evidence on the motion for summary judgment presents a sufficient disagreement to require submission to a jury, or whether it is so one-sided that one party must prevail as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986). If reasonable minds could differ as to the conclusions drawn from the evidence in the record, the motion for summary judgment should be denied. *Id.*

ANALYSIS

On July 3, 1991, this court issued an Opinion and Order finding hat Columbia Steel was entitled to a declaration that Order No. 72-870 of the OPUC neither empowered nor authorized PGE to monopolize the service of electric power to Columbia Steel. *Pacificorp v. Portland Gen. Elec. Co.*, 770 F. Supp. 562, 571 (D. Or. 1991) (*Pacificorp*).

In *Pacificorp*, this court found that PGE and Pacificorp entered into an agreement to exchange electric distribution properties and customer accounts in certain defined areas within and around the City of Portland (the 1972 Agreement); that the 1972 Agreement was not a contract whereby the parties allocated territories and customers within those areas for the provision of exclusive services and was not a contract that limited their rights to operate within the areas in the future; and that Order No. 72-870 of the OPUC did not order the allocation of territories and customers and did not designate which territory was to be served by which contracting party.

These findings constitute the law of the case and require no revisitation.

On June 29, 1991, this court found that Order No. 92-557 filed by the OPUC on April 16, 1992, did not alter the order of this court filed on July 3, 1991 that Columbia Steel was entitled to a declaration that Order No. 72-870 neither empowered nor authorized PGE to monopolize the service of electric power to Columbia Steel.

These findings constitute the law of the case and require no revisitation.

PGE admits that employees of PGE believed that the 1972 Agreement was intended to, and did in fact, create exclusive service territories. There was no question that after the 1972 Agreement was signed, the conduct of PGE and others was based upon the belief that competition for the provision of electric services had been eliminated. PGE continues to argue that exclusive service territories were created in 1972, despite the ruling of the court to the contrary.

PGE relies upon other orders of the OPUC, such as Order No. 74-658, as well as the recognition of other agencies, such as the Federal Power Commission, to demonstrate that the belief of employees at PGE that competition had been eliminated was reasonable. However, the issue is not whether the belief of employees of PGE and other that the 1972 Agreement and Order No. 72-870 of the OPUC eliminated competition was a reasonable belief. This court has ruled that the 1972 Agreement and Order No. 72-870 of the OPUC did not have the legal effect of eliminating competition. The court has never ruled or implied that PGE acted in bad faith, but no belief however reasonable it may have been, alters the legal effect of the 1972 Agreement and Order No. 72-870 of the OPUC.

PGE contends that this action should be dismissed because it is barred by Section 4(B) of the Clayton Act, 15 U.S.C. § 15(b), which allots four years from the date of accrual of a cause of action in which to bring an antitrust suit. There is no question that the 1972 Agreement and Order No. 72-870 of the OPUC occurred more than four years prior to this action. Columbia Steel, however, alleges that this action is not barred because 1) PGE participated in a continuing conspiracy in

violation of Section 1 of the Sherman Act; and 2) fraudulent concealment by PGE tolls the statute of limitations.

The court will first address the claim of Columbia Steel of fraudulent concealment on the part of PGE. Columbia Steel asserts that the following facts support its claim of fraudulent concealment:

> 69. No one at Columbia Steel ever read Order No. 72-870 until after counsel were engaged in September 1988 to explore alternatives to PGE service. prior to that time, Columbia Steel representatives reasonably believed defendant's assertions that PGE had the exclusive right to serve Columbia Steel.
>
> 70. Guy Marshall, joined Columbia Steel as Director of Corporate Policy in September 1989. Prior to that time, he had no involvement with Columbia Steel on energy matters. After counsel were engaged, and supplied him with the historical materials and advice, Mr. Marshall reached the conclusion that PGE had no exclusive service territory.

Columbia Steel's Statement of Material Facts in Opposition to PGE's Motion for Summary Judgment and in Support of its Cross-Motion for Summary Judgment, pp. 25-26 (citations omitted).

Columbia Steel asserts that the affirmative assertions of PGE of an exclusive right to serve constitute the sort of "affirmative conduct upon the part of the defendant which would, under the circumstances of the case, lead a reasonable person to believe that he did not have a claim for relief." *Rutledge v. Boston Woven Hose and Rubber Co.*, 576 F.2d 248, 250 (9th Cir. 1978). Columbia Steel also relies upon a case in which the court concluded that "where there is a fiduciary duty to disclose information on a particular matter, failure to do so

will constitute fraud or fraudulent concealment that tolls the statute of limitations on any claim as to notice of which that information is material." *Riddell v. Riddell Washington Corp.*, 866 F 2.d 1480, 1496 (D.C. Cir. 1989).

There is no evidence to support a finding that PGE had a fiduciary duty to disclose any further information to Columbia Steel in this case. The facts are undisputed that when Columbia Steel chose to do so, Columbia Steel retained counsel and reviewed the appropriate, publicly available documents and formed its own opinion as to the exclusive right of PGE to serve Columbia Steel. There is no evidence in this case to support a claim for fraudulent concealment by PGE. The claim made by Columbia Steel in this case is limited to a continuing conspiracy within the applicable four-year statute of limitation period.

"[E]ven when a plaintiff alleges a continuing violation, an overt act is required to restart the statue of limitations and the statute runs from the last overt act." *Pace Indus. v. Three Phoenix Co.*, 813 F.2d 234, 237 (9th Cir. 1987). If no overt act in furtherance of the conspiracy occurs within the limitations period, the action is barred.

An overt act in furtherance of a continuing conspiracy will only restart the statute of limitations if it passes a two-part test: "1) It must be a new and independent act that is not merely a reaffirmation of a previous act; and 2) it must inflict new and accumulating injury on the plaintiff." *Id.* at 238.

> The Ninth Circuit determines the accrual of civil conspiracies for limitations purposes in accordance with the last overt act doctrine. Under this doctrine, "[i]njury and damage in a civil conspiracy action flow from the overt acts, not from 'the mere continuance of a conspiracy'." Consequently, the cause of action runs separately from each overt act that is alleged to cause damage to the plaintiff, and "[s]eparate conspiracies may not be characterized as a single grand conspiracy for procedural advantage." Accordingly, plaintiffs may recover only for the

> overt acts . . . that they specifically alleged to have occurred within the . . . limitations period.

Gibson v. United States, 781 F.2d 1334, 1340 (9th Cir. 1986) (citations omitted).

Columbia Steel has alleged two acts which took place within the limitations period: 1) PP&L refused service in approximately February, 1987; and 2) PGE orally refused to transfer power as requested to PP&L, and then did so in writing in May, 1990.

PGE asserts that each of these acts was a mere reaffirmation of positions taken earlier by the respective utilities and do not restart the running of the statute of limitations period. PGE asserts that Columbia Steel has suffered no new and accumulating injury within the limitations period. PGE asserts that even if Columbia Steel's claim is not wholly time barred, Columbia Steel may only recover for damages for the overt acts in furtherance of the conspiracy which occurred within the four-year statute of limitations period.

Columbia Steel can recover damages caused by the overt acts of PGE which occurred within the statute of limitations period, or in this case four years prior to the filing of this action on June 19, 1990. Columbia Steel cannot recover damages from PGE because PP&L refused service in February, 1987. There is no evidence that Columbia Steel contacted PGE in February, 1987 or that PGE refused a request by Columbia Steel to transfer power to another provider in February, 1987. Columbia Steel cannot recover damages from PGE for actions taken or not taken by PP&L. Even where officials of PP&L contacted officials of PGE and discussed the request for service, the refusal of service was an act by PP&L and not an act by PGE.

On May 30, 1990, Columbia Steel wrote to PGE stating that it was ready to terminate its contract with PGE and take power form PP&L as of July 1, 1990, if PGE would agree to make its substation available to allow the delivery of the power that PP&L offered to deliver. At this point, Columbia Steel had made other specific arrangements, and PGE refused to allow the

transfer asserting that "if [Columbia Steel] desires to purchase electricity, it must do so from PGE." Exhibit 55 to the Affidavit of Allan M. Garten, p.3. This refusal to consider a specific request to transfer power was more than a mere reaffirmation of positions taken earlier and must be considered as an overt act within the statute of limitations period.

On July 25 1990, Columbia Steel and PGE executed a contact for electric services, but it was not until July, 1991 that Columbia Steel began to purchase power delivered from PGE from PP&L. The court finds that the damages in this case are limited to the additional costs incurred by Columbia Steel for electric services during the one-year period of time in which Columbia Steel was willing and able to actually purchase power at a lower rate from PP&L, but was unable to do so because of PGE's assertion of an exclusive service territory.

There is no evidence in this case which would support a claim from Columbia Steel for additional damages resulting from the earlier inquiries made by Columbia Steel to obtain electric services from source other than PGE.

There are no other grounds upon which Columbia Steel is barred from recovering the actual damages it incurred as a direct result of the assertion by PGE of an exclusive right to provide electric services to Columbia Steel prior to July, 1991.

CONCLUSION

The court concludes that Columbia Steel is entitled to recover the actual damages it incurred as a direct result of the assertion by PGE of an exclusive right to provide electric services to Columbia Steel prior to July, 1991. Damages in this case are limited to the additional costs incurred by Columbia Steel for electric services from July 25, 1990 to July, 1991, during which time Columbia Steel was willing and able to actually purchase power at a lower rate from PP&L but was unable to do so because of PGE's assertion of an exclusive service territory.

PGE's motion for summary judgment (#262) is granted in part and denied in part. Columbia Steel's cross-motion for summary judgment (#310) is granted in part and denied in part.

The parties shall consult and attempt to agree as to the amount of damages based on this opinion. Any agreement as to the amount of damages shall not be construed by this court or by any other court as any concession of a contrary position taken at any earlier time in this case. The parties have thirty days to attempt to resolve this issue. At the end of thirty days, if no agreement can be reached as to the amount of damages based upon the court's rulings herein, the parties shall present to this court their contentions, and the court will make further rulings.

DATED this 4th day of February, 1993.

/s/_____

HELEN J. FRYE
United States District Judge

APPENDIX G

APPENDIX G

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

COLUMBIA STEEL CASTING CO., INC., an Oregon corporation,	)	
Plaintiff,	)	
v.	)	Civil No. 90-524-FR (LEAD) Civil No. 90-592-FR
PORTLAND GENERAL ELECTRIC COMPANY, an Oregon corporation; PACIFICORP, doing business as Pacific Power & Light Company; MYRON B. KATZ, JOAN SMITH, and RONALD EACHUS,	)	OPINION AND ORDER [Entered May 28, 1993]
Defendants.	)	

FRYE, Judge:

The matters before the court are 1) the motion of defendant Portland General Electric Company (PGE) for reconsideration and notice of related case (#323); and 2) the cross-motion of the plaintiff, Columbia Steel Casting Co., Inc. (Columbia Steel), for reconsideration (#337).

PGE moves the court for reconsideration of the court's opinion and order of February 4, 1993 granting summary judgment in part to PGE and in part to Columbia Steel on the grounds that, on February 9, 1993, the Honorable Richard D.

Barber, a Marion County Circuit Court Judge, issued an opinion in Columbia Steel Casting Co. v. Public Util. Comm'n of Or., Marion County Circuit Court Case No. 92C-12005, in which he affirmed the two orders issued by the Oregon Public Utilities Commission in 1992.

Columbia Steel asks this court to reconsider that part of its opinion and order of February 4, 1993 in which the court concludes that Columbia Steel cannot recover damages from PGE for actions taken or not taken by Pacific Power & Light Company (PP&L).

APPLICABLE STANDARD

A motion for reconsideration must demonstrate some reason why the court should reconsider its decision. The motion must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision. Courts have distilled three major grounds justifying reconsideration: 1) an intervening change in controlling law; 2) the availability of new evidence; and 3) the need to correct clear error or prevent manifest injustice. All Hawaii Tours Corp. v. Polynesian Cultural Ctr., 116 F.R.D. 645, 648 (D. Haw. 1987), rev'd in part on other grounds, 855 F.2d 860 (9th Cir. 1988).

ANALYSIS AND RULING

The decision of Judge Barber does not alter the conclusion of this court that the "claim of PGE to a monopoly was not specifically and clearly authorized at the time that this court decided that Columbia Steel was entitled to a declaration that Order No. 72-870 neither empowers nor authorizes PGE to monopolize the service of electric power to Columbia Steel." Opinion of June 29, 1992, pp. 8-9. There is no state action upon which PGE may rely to evade liability in this case.

The court has reviewed all the arguments made in support of and in opposition to the motions to reconsider and finds that there are no facts which require reconsideration. The court will adhere to its prior ruling. The parties are ordered to make a

good faith effort to agree upon the amount of damages, neither party waiving their prior agreements as to liability. The court will then enter a judgment, and the parties may proceed to the appellate level.

CONCLUSION

PGE's motion for reconsideration and notice of related case (#323) is DENIED. Columbia Steel's cross-motion for reconsideration (#337) is DENIED.

IT IS SO ORDERED.

DATED this 28th day of May, 1993.

/s/_____

HELEN J. FRYE
United States District Judge

APPENDIX H

APPENDIX H

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

COLUMBIA STEEL CASTING CO., INC., an Oregon corporation, Plaintiff, v. PORTLAND GENERAL ELECTRIC COMPANY, an Oregon corporation; PACIFICORP, doing business as Pacific Power & Light Company; MYRON B. KATZ, JOAN SMITH, and RONALD EACHUS, Defendants.	Civil No. 90-524-FR (LEAD) Civil No. 90-592-FR O P I N I O N [Entered August 11, 1993]

FRYE, Judge:

The matter before the court is the resolution of issues related to the motion of Columbia Steel Casting Co., Inc. for the entry of final judgment under Fed. R. Civ. P. 54(b) (#353).

BACKGROUND

On February 5, 1993, this court held that Portland General Electric Company (PGE) was liable to Columbia Steel Casting Co., Inc. (Columbia Steel) for damages sustained by Columbia

Steel from July 25, 1990, when Columbia Steel and Pacific Power and Light Company (PP&L) executed a contract whereby PP&L was to provide and Columbia Steel was to receive electric services provided by PP&L. The court directed the parties to "consult and attempt to agree as to the amount of damages" that PGE was to pay to Columbia Steel. Opinion, February 5, 1993, p. 26: Order, February 5, 1993, p. 2. Each of the parties filed a motion for reconsideration.

After considering the motions of the parties for reconsideration of the court's holding of February 5, 1993, the court again directed the parties to "make a good faith effort to agree on the amount of damages" that PGE was to pay to Columbia Steel. Opinion and Order, May 28, 1993, p. 4.

On July 9, 1993, the parties filed a document entitled "Columbia Steel Casting Co., Inc.'s and Portland General Electric Company's Stipulation Regarding Damages Calculation and Attorney Fees and Costs," which sets out the facts agreed to by the parties which form the basis of the continuing legal dispute between the parties.

Prior to the entry of judgment, the court must resolve the disputes remaining between the parties which relate to the following three issues: 1) the appropriate measure and amount of damages; 2) the appropriate award of costs, including reasonable attorney fees; and 3) the appropriate form of judgment.

1. The Appropriate Measure and Amount of Damages

Columbia Steel contends that the total amount of damages it suffered is $261,469, and that pursuant to 15 U.S.C. § 15(a), that sum must be trebled.

PGE contends that the court should award damages to Columbia Steel in the sum of $169,475.

From 1979 through 1990, additional meters were added until, in April, 1990, Columbia Steel was receiving power from PGE through five electrical meters. When PP&L begins to deliver electric services to Columbia Steel, the method of delivering electric power through five electrical meters will be

replaced by a method of delivering electric power through two electrical meters.

Columbia Steel contends that its award of damages should take into account the fact that it will ultimately have a two-meter method of service, which adds $81,657 in damages related to the costs associated with the conversion from the five-meter method of service provided by PGE to the two-meter method of service provided by PP&L.

PGE argues that the costs of the conversion from a five-meter method of service to a two-meter method of service is a capital improvement cost, which cannot be claimed as damages in this case.

In its opinion of February 5, 1993, at pages 24-25, this court concluded:

> On July 25, 1990, Columbia Steel and [PP&L] executed a contract for electric services, but it was not until July, 1991, that Columbia Steel began to purchase power delivered from PGE from PP&L. The court finds that the damages in this case are limited to the additional costs incurred by Columbia Steel for electric services during this one-year period of time in which Columbia Steel was willing and able to actually purchase power at a lower rate from PP&L, but was unable to do so because of PGE's assertion of an exclusive service territory.

The court finds that there is no basis to award as damages to Columbia Steel the costs which may have been incurred by Columbia Steel in converting and improving the system by which it receives electric services. The court finds that the damages are the difference between the rates charged by PGE and PP&L for the period from July 25, 1990, through July 15, 1991, under the five-meter points of delivery, which is $169,475, and that this sum should be trebled pursuant to 15 U.S.C. § 15(a).

2. The Appropriate Award of Costs, Including Reasonable Attorney Fees

[omitted]

3. The Appropriate Form of Judgment

Columbia Steel moves the court to enter judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure in order to allow an immediate appeal. Columbia Steel argues that the claims it made pursuant to Section 2 of the Sherman Act were not resolved by the findings of this court in its Opinion of February 5, 1993 relating to the Section 1 conspiracy claim. Columbia Steel argues that "[w]hen this court's rulings are affirmed on appeal, and PGE has paid the judgment ordered by this Court, Columbia Steel will dismiss all remaining claims in this court." Columbia Steel's Reply memorandum in Support of Motion for Entry of Judgment Under Fed. R. Civ. P. 54(b), p. 17.

PGE contends that the entry of judgment under Rule 54(b) is not appropriate, and that this court should enter a final judgment. PGE explains that the damages under both Section 1 and Section 2 are identical and have been resolved. In addition, PGE argues that the claims under Section 1 and Section 2 are based upon a single set of facts and do not constitute multiple claims under Rule 54(b).

Rule 54(b) of the Federal Rules of Civil Procedure provides, in relevant part:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

In Texaco, Inc. v. Ponsoldt, 939 F.2d 794 (9th Cir. 1991), the court stated:

> Rule 54(b) certification is proper if it will aid "expeditious decision" of the case. The Rule 54(b) claims do not have to be separate from and independent of the remaining claims. However, rule 54(b) certification is scrutinized to prevent piecemeal appeals in cases which should be reviewed only as single units.

Id. at 797-98 (internal quotations and citations omitted).

The Section 2 claims have not been resolved in these proceedings. Certification of the judgment on the Section 1 claim in order to allow the appeal of the state action question will aid the expeditious resolution of this case because the issues involved in the Section 1 claim have been a major source of the controversy in this case. There does not appear to be any danger that inappropriate multiple appeals will result. While this court prefers to resolve all aspects of a case before an appeal, the provisions of Rule 54(b) apply in this case, and the court finds that Columbia Steel is entitled to the entry of judgment under Rule 54(b).

CONCLUSION

The motion of Columbia Steel for the entry of judgment under Fed. R. Civ. P. 54(b) (#353) is granted. Columbia Steel shall prepare the appropriate judgment.

DATED this 10th day of August, 1993

/s/_____

HELEN J. FRYE
United States District Judge

APPENDIX I

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

COLUMBIA STEEL CASTING CO., INC., an Oregon corporation,	)	
Plaintiff,	)	Civil No. 90-524-FR (LEAD)
v.	)	Civil No. 90-592-FR
PORTLAND GENERAL ELECTRIC COMPANY, an Oregon corporation; ROGER HAMILTON, JOAN SMITH, and RONALD EACHUS,	)	JUDGMENT PURSUANT TO FED. R. CIV. P. 54(B)
Defendants.	)	[Entered September 10, 1993]

WHEREAS the court entered an Opinion and Order dated February 4, 1993, finding defendant Portland General Electric Company ("PGE") liable in damages to plaintiff Columbia Steel Casting Co. ("Columbia Steel") for violations of § 1 of the Sherman Antitrust Act;

WHEREAS the Court entered an Opinion and Order dated May 28, 1993, denying both defendant's and plaintiff's motions for reconsideration of the February 4, 1993 Opinion and Order, and directed both parties to make a good faith effort to agree on the amount of damages;

WHEREAS the parties have filed their submissions on damages, and plaintiff has filed a petition for recovery of fees and costs, and motion for entry of judgment pursuant to Rule

54(b) of the Federal Rules of Civil Procedure;

THIS COURT HEREBY FINDS:

1. Plaintiff's claims under § 2 of the Sherman Act are still pending in this Court.

2. The issues resolved by the court in its February 4, 1993 Opinion concerns PGE's liability under § 1 and its defenses have been a major source of controversy in this case.

3. There does not appear to be any danger that inappropriate multiple appeals will result from certification of the § 1 claims for immediate appeal.

4. Entry of final judgment on the § 1 claims against PGE and certification of an appeal under Rule 54(b) would aid in the efficient and expeditious disposition of this case.

5. For the reasons stated above and in the Court's opinion of August 10, 1993, no just reason for delay exists for delaying entry of a final judgment on the § 1 claims against PGE in this case, and the interests of the parties and the courts will be served by an immediate entry of a final judgment pursuant to Rule 54(b) on those claims.

NOW, THEREFORE, IT IS HEREBY ADJUDGED AND DECREED that the Clerk shall enter final judgment for the plaintiff Columbia Steel and against PGE in the amount of $169,475, to be trebled pursuant to 15 USC § 15, for a total of $508,425, plus the amount of $901,671.62 for costs and a reasonable attorney's fee, in accordance with and for reasons set forth in this Court's Opinion and Order of July 8, 1991, Opinion and Order of February 4, 1993, Opinion and Order of May 28, 1993 and Opinion and Order of August 10, 1993. Columbia Steel may file a supplemental petition for any additional fees and costs not covered by the Court's August 10, 1993 Opinion and Order within thirty days after entry of

judgment.

DATED this 8th day of September, 1993.

/s/_____
HELEN J. FRYE
United States District Judge

APPENDIX J

APPENDIX J

BEFORE THE PUBLIC UTILITY COMMISSIONER

OF OREGON

UF 2947

In the matter of the joint application of PACIFIC POWER & LIGHT and PORTLAND GENERAL ELECTRIC COMPANY, for an order (1) approving and authorizing the exchange of electric utility facilities located in Multnomah and Columbia Counties, Oregon, and (2) approving the assignment to Portland General Electric Company of certain service territory in Columbia County, Oregon, previously allocated to Pacific Power & Light Company.	O R D E R No. 72-870 [Entered December 15, 1972]

On August 8, 1972, the Commissioner accepted for filing a joint application by Pacific Power & Light Company and Portland General Electric Company for an order or orders approving and authorizing:

1. The exchange of electric utility property and service facilities located in Multnomah and Columbia Counties.

2. The assignment from Pacific Power & Light Company to Portland General Electric Company of certain service territory heretofore allocated to

Pacific Power & Light Company by the Public Utility Commissioner.

On September 14, 1972, Notice of Hearing was issued and served on the applicants, other persons expressing an interest in this matter, and on the mayors of the cities involved, and releases announcing public hearings were made to the news media serving the areas affected.

Evidence was offered in behalf of applicants, the Public Utility Commissioner and other parties. The hearing was completed, the record closed and the matter submitted for determination. Based upon the evidence and record, it is found that:

Pacific Power & Light Company (Pacific) is a Maine corporation qualified to do business in Oregon. Pacific is an operating public utility which, among other things, is engaged in supplying electrical energy to customers in Oregon.

Portland General Electric Company (Portland General) is an Oregon corporation authorized to do business in Oregon. It is engaged in the business of supplying electrical energy to customers in Oregon.

Both Pacific and Portland General are public utilities subject to the jurisdiction of the Public Utility Commissioner of Oregon.

The Commissioner's approval is needed prior to the sale, lease, assignment or other disposition of public utility property pursuant to ORS 757.480. The Commissioner's approval is also needed prior to the assignment of any allocated utility service territory pursuant to ORS 758.460.

On July 18, 1972, Pacific and Portland General entered into an agreement whereby an exchange of property and utility facilities would be made between the applicants in the City of

Portland and areas adjacent thereto and Pacific would transfer certain properties and facilities to Portland General in Pacific's Rainier Service District. This exchange and transfer also involves the transfer of customers from one party to the other.

Approximately 28,000 customers now served by Pacific will be served by Portland General, and 38,000 now served by Portland General will be served by Pacific. The City of Portland approved the exchange of property within its corporate boundaries conditioned upon Commissioner's approval by Ordinance No. 134416, passed by the City Council on April 26, 1972. With the cities' consent, Portland General will assign its franchise with the City of Maywood Park to Pacific, and Pacific will assign its franchise with the City of Rainier to Portland General.

The total original cost of the utility properties and facilities to be exchanged and the accumulated depreciation related thereto will be furnished to the Commissioner upon completion of a detailed inventory of all property subject to this agreement. It is presently estimated that the depreciated original booked cost of the property and facilities to be transferred to Pacific is $10,000,000 and of those to be transferred to Portland General is $14,500,000.

The companies state that the facilities acquired from each other will continue to be operated in the same manner as before the transfer.

In the Portland areas affected by the transfer, both Portland General and Pacific have service extensions scattered throughout such areas. Both utilities have transmission and distribution facilities running throughout the area, often side by side or on the same poles. The individual facilities of either company are generally sufficient now or with minor modification to serve all customers in the area independently. Elimination of duplicating facilities will allow a more efficient and economical use of the respective companies' utility facilities. While this may not

result in rate decreases for a number of reasons, it will have a tendency to reduce future revenue requirements for the benefit of the customers of the respective companies.

In addition to the above, removal of one set of electrical lines, poles and appurtenant facilities will improve the aesthetics of the area, have a beneficial environmental effect and assist in the long-range requirement and desirability for underground facilities.

The elimination of one set of energized wires from a joint use pole results in improved safety for employees working on the lines and for people in the area in case of downed lines or poles.

Transfer of the service territory, property and facilities of Pacific in the Rainier area to Portland general will result in more economical and reliable service. The area is isolated from the rest of Pacific's service area but is contiguous to Portland General's service area. Future expansion can more economically be made by Portland General.

The division of property and customers was made on the basis of revenue. After the exchange, each company should receive the same amount of annual revenue dollars to support its investment that it had before the exchange.

The exchange of facilities and the agreements governing such exchange and change over of service from one company to the other is by agreement between Pacific Power & Light Company and Portland General Electric Company, made and entered into on July 18, 1972. A copy of this agreement is included in and made a part of the application on file herein.

Parcel A and Parcel B, set forth in Appendix "A," attached hereto and by this reference made a part hereof, are descriptions of the boundaries of the service area within which Pacific is transferring to Portland General all the electric distribution

plant, including distribution substations, poles, lines, transformers, meters, related distribution facilities and all easements necessary for the operation thereof. Excluded from the above transfer are: (1) facilities owned, operated and maintained by Pacific within an area commonly known as the Portland downtown core area, which is designated as Parcel C, described in Appendix "A," and (2) certain duct lines owned, operated and maintained by Pacific extending Pacific's Albina substation to Pacific's facilities within the Portland downtown core area. Pacific is also transferring to Portland General the exclusively served area described as Parcel A in Appendix "A" (exclusively served area within Columbia County allocated by PUC Order No. 38498).

Appendix "B," attached hereto and by this reference made a part hereof, is a description of the boundaries of the service area within which Portland General is transferring to Pacific all of the electric distribution plant, including distribution substations, poles, lines, transformers, meters, related distribution facilities and all easements necessary for the operation thereof and designated as Parcels A and B in Appendix "B." Excluded from the above are: (1) facilities described under the street light plant account of the Uniform Systems of Account, except that leased area lights will be conveyed to Pacific; (2) certain duct lines owned, operated and maintained by Portland General extending from Portland General's Station "L" to Portland General's facilities within the Portland downtown core area; and (3) standard wood poles used exclusively for street lighting.

The companies submitted as part of their application, designated as Exhibit No. 1, a copy of the aforementioned agreement between Pacific and Portland General. The agreement and its attachments generally describe the properties, including real property, to be transferred and exchanged. It further sets forth the rights and obligations of each company with respect to joint use of certain transmission facilities; disconnections and reconnections and the cost thereof; repair,

maintenance and replacement of facilities; tabulation of units of property exchanged and the exchange or furnishing of maps and records related to the facilities transferred; transmission interconnects and metering equipment; distribution interconnects and metering systems; energy exchanges, the recording thereof and payment therefor; conveyance dates and transfer of customer accounts; proration of taxes; damage occurring to facilities prior to cutover; and injury to persons or damage to property of others and employees of the respective companies.

Parties protestant raised two issues which have significance in this proceeding:

First, the transfer or exchange of property between the two companies should not result in a change in valuation of the property on the exchange which would have the effect of changing the rate base for rate purposes. Any transfer herein will be subject to final inventory and valuation of the property exchanged and to the review of accounting methods used to record the transactions, all as approved by the Commissioner.

Second, the billing of customers by the company to which they were transferred should not result in any billing different than had the bill been rendered by the company previously serving the customer.

A third point raised by one industrial customer was that it is a Portland General customer on a Schedule 89 rate. Since Pacific does not have a schedule comparable to Schedule 89, Pacific will file with the Commissioner a special contract with this one industrial customer comparable to Schedule 89. This customer fears that in future rate proceedings this rate will be eliminated. This rate, when filed with the Commissioner, can only be changed with the Commissioner's approval.

It should be recognized that any rate or rate schedule is subject to change. The customer has no more assurance that the contract or scheduled rate would not be changed by Portland

General than it does with Pacific. Nevertheless, no change in rates may occur without the approval of the Commissioner, with an opportunity for a hearing, to which this customer, as any other, is entitled to adequate notification.

The agreements have been reviewed by the Public Utility Commissioner and nothing appears therein which is inconsistent with proper regulatory policy or practice except paragraph No. 7, transfer of customer accounts. The companies agreed to commence transferring customers' accounts and customers from one company to the other on July 24, 1972. At the time of hearing, October 2, 1972, all customers had purportedly been transferred.

This transfer and exchange was clearly done without the authority or approval of the Commissioner. The companies take the position that the transfer of customers from one company to another does not need the approval of the Commissioner. This is clearly in error.

Customers of a utility are not mere pawns to be moved at the convenience of the company. The customer is directly affected when any change may affect the quality or quantity of his service and what he pays for that service. There can be no question that the Commissioner has regulatory control over any such transfers or exchanges of customers.

In view of the fact that the overall best interests of the consumers are served by approval of this proposal, no action will be taken as to the untimely transfer of customers. Elimination of duplicate facilities, as mentioned previously, actually will result in aesthetic and economic benefits.

In addition, the Commissioner requires that the transfer of customers be accomplished without any inequities caused by variations in billing cycles. Each transferred customer is to be placed on a rate schedule equivalent to that on which he was prior to the transfer.

The customer being transferred will receive a final bill from the company formerly serving them. The bills will be issued to conform with the beginning of a full billing cycle with the company to which the customer is transferred. This means that some transferred customers will receive termination bills for more than a full billing cycle and some for a shorter period. In each instance, the bills are to be prorated so that the kilowatt hour blocks, minimum charges and special charges are adjusted to compensate for the changed billing cycle. The end result should be the customer paying the same amount for his service during the change-over period as if no transfer were made.

The companies' proposal is that those employees living in the territory being transferred to the other company are to be maintained on the respective hiring company's account as its own customers. This would be applicable only to employees living within the territories on the date of transfer. This method results in discrimination in that the company serving the area should serve all persons living in that area and, just because the customer is an employee of the utility, this should not permit him the right to choose which utility service he will take. The company may compensate their employees for the loss of their electric service discount; however, these employees, like any other customers in the area, must become the customers of the new utility serving the area.

In the case of residential schedules and most commercial schedules, a comparison of those of Portland General and Pacific reveals that the schedules are equivalent. In the few special situations where exact equivalency is not apparent, the companies have agreed to carry the customers on an equivalent schedule by means of a special contract and these contracts will be filed with the Commissioner.

The properties being transferred will be recorded upon the respective books of Pacific and Portland General, using the original cost of the properties, less related depreciation, in such a manner that plant balances on the respective utility books are

unchanged in total by the transfer of properties. The accounting will record the difference in the value of the property which Pacific transfers to Portland General and that which it receives from Portland General as an acquisition adjustment on Pacific's books. This adjustment will be amortized over the remaining life of the properties acquired. This same difference will be recorded on Portland General's books as an increase in its depreciation reserve. This accounting method allows elimination of possible penalties to rate payers of either company as a result of the difference in value of the property exchanged.

The proposed recording of the property transferred upon the respective utility's books is proper and in conformance with accepted utility accounting practices and procedures.

From the foregoing, it is concluded that the application of Pacific Power & Light Company and Portland General Electric Company should be granted and an order entered approving the transfer of certain exclusively served territory in the Rainier area from Pacific Power & Light Company to Portland General Electric Company and approving the transfer and exchanging of utility property and facilities and customers between the two companies as applied for. It is therefore

ORDERED that the application of Pacific Power & Light Company to transfer certain of its exclusively served area allocated to it and lying in and around Rainier, Oregon, to Portland General Electric Company is approved. Such assigned area is described as Parcel A in Appendix "A," attached hereto and made a part hereof; it is further

ORDERED that Pacific Power & Light Company may transfer to Portland General Electric Company all electric distribution plant, including distribution substations, poles, lines, transformers, meters, related distribution facilities situated within or used for providing utility service within the boundaries of Parcel A described in Appendix "A," and within the

boundaries of Parcel B described in Appendix "A," excepting and excluding such facilities within an area commonly known as the Portland downtown core area, described as Parcel C in Appendix "A," and excepting and excluding certain duct lines owned, operated and maintained by Pacific Power & Light Company extending Pacific's Albina substation to Pacific's facilities within the Portland downtown core area; it is further

ORDERED that Portland General Electric Company may transfer to Pacific Power & Light Company all electric distribution plant, including distribution substations, poles, lines, transformers, meters and related distribution facilities and all easements necessary for the operation thereof used for providing service in or lying within the boundaries of Parcels A and B, described in Appendix "B," attached hereto and made a part hereof, excluding however: (1) facilities described under the street light plant account of the Uniform Systems of Account, except that leased area lights will be conveyed by Portland General Electric Company to Pacific Power & Light Company; (2) certain duct lines owned, operated and maintained by Portland General Electric Company extending from Portland General Electric Company's Station "L" to Portland General Electric Company's facilities within the Portland downtown core area; and (3) standard wood poles used exclusively for street lighting; it is further

ORDERED that the real property necessarily incidental to the transmission and distribution substations and the fee interest in easements may be conveyed to the respective parties as provided by agreement between the companies; it is further

ORDERED that the manner and method for accomplishing the transfer and exchange of property, facilities and customers, and the terms and conditions governing this transfer, shall be as provided by that agreement between the companies herein, dated July 18, 1972. However, the company employees living in the area being transferred to the other company shall become customers of the utility serving the area. (This does not

preclude the transferring company to compensate their employees for the loss of their electric service discount as a result of this transfer). It is further

ORDERED that, in each instance, the bills are to be prorated so that the kilowatt hour blocks, minimum charges and special charges are adjusted to compensate for the changed billing cycle. The result should have the customer pay the same amount for his service during the change-over period as if no transfer were made; it is further

ORDERED that the transfer of property approved herein shall be recorded upon the utilities' records in the manner set forth in the proposed entries filed with the application; and it is further

ORDERED that the respective applicants shall each file true copies of the final inventories and journal entries recording the transactions approved herein upon their respective books within 60 days after such transfer is consummated.

Made, entered and effective December 15, 1972.

_____

Diarmuid F. O'Scannlain
Public Utility Commissioner

APPENDIX "A"

RELATED AREAS - TRANSFER
FROM PACIFIC POWER & LIGHT COMPANY
TO PORTLAND GENERAL ELECTRIC COMPANY

PARCEL "A"

EXCLUSIVE SERVICE AREA
OF
PACIFIC POWER & LIGHT COMPANY
Rainier, Oregon

Beginning at a point which is the intersection of the northerly extension [continued metes and bonds description of property]

PARCEL "B"

Portland Area
PP&L to PGE

Beginning at a point on the Oregon-Washington State line and an extension of the east side of Sundial Ranch Road [continued metes and bounds description of property]

PARCEL "C"

EXCLUSION FROM
PARCEL "B"

Beginning at a point on the center line of S.W. Market Street at its intersection with the center line of S.W. First Avenue; [continued metes and bounds description of property]

APPENDIX "B"

RELATED AREAS - TRANSFER FROM PORTLAND GENERAL ELECTRIC TO PACIFIC POWER & LIGHT COMPANY

PARCEL "A"

Beginning at the point of intersection of the South line of the North Portland Harbor with the centerline of the Pacific Highway [continued metes and bounds description of property]

PARCEL "B"

Beginning at the point of intersection of the extended centerline of S.W. Jefferson Street with the centerline of Pacific Highway no. [continued metes and bounds description of property]

APPENDIX K

APPENDIX K

Order #73-688

BEFORE THE PUBLIC UTILITY COMMISSIONER

OF OREGON

UF 3001

In the matter of the filing of Revised Tariff Schedules applicable to electric service in the State of Oregon by PORTLAND GENERAL ELECTRIC COMPANY.	))))))	ORDER [Excerpt]

. . .

The company's present service area is a 3,371 square mile area within a state-approved service area allocation of 4,339 square miles, including 54 incorporated cities of which Portland and Salem are the largest.

. . .

Made, entered and effective October 25, 1973.

/s/ RICHARD W. SABIN
PUBLIC UTILITY COMMISSIONER

APPENDIX L

APPENDIX L

Order #74-658

BEFORE THE PUBLIC UTILITY COMMISSIONER

OF OREGON

UF 3074

In the matter of the suspension of revised tariff schedules applicable to electric service in the State of Oregon by PACIFIC POWER & LIGHT COMPANY (On the Commissioner's own motion).	ORDER [Excerpt]

. . .

For Oregon ratemaking purposes, Pacific's service area is divided into Area S (Springfield), D (The Dalles), P (Portland), and A (all other). The rates for service are the same for all points located in each area. Areas S and D rates are special competitive rates, lower than rates in the other areas, and designed to match the rates of the non-private and non-regulated electric utilities serving that same area. The rates for service in Area P are generally lower than for similar service in Area A.

It must be noted that the Commissioner has previously only allowed lower, competitive rates to be charged by Pacific in Areas S and D, provided that the difference between the lower competitive rates and the Area A rates be borne solely by Pacific's shareholders and not by Pacific's customers. Although no increase was proposed, for the competitive areas, the proposed rates result in an increase in the "competitive area adjustment" in the amount of $1,185,000 based upon the difference between the existing competitive area rates and the proposed Area A rates.

The lower Area P rates have been allowed for some time in the Portland area so that the electric rates would be on parity with those of Portland General Electric compared with PP&L. PGE also serves the Portland area - both companies being regulated and both companies being franchised to serve the City of Portland. Historically, the two companies competed for customers in this area.

. . .

C. Area A and Area P Rates

The rates in Area P (Portland) are generally lower than in Area A. A rate differential between Area P and Area A was formerly justified on the basis of competing electric service in Area P between Pacific and Portland General Electric. For various reasons, it was believed that in the Portland metropolitan area rates between two similar utilities serving the same area should be the same.

The two companies no longer competitively serve the same areas. Their respective areas of service within Portland have been defined. Thus, with the lack of competition, the justification for rate uniformity is said to have disappeared.

. . .

Made, entered and effective September 3, 1974.

/s/_____
RICHARD W. SABIN
PUBLIC UTILITY COMMISSION

APPENDIX M

APPENDIX M

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON
UA 37
UA 41

In the Matter of the Application of PORTLAND GENERAL ELECTRIC COMPANY for a Declaratory Order, an Order Allocating Exclusively Served Territory, and an Order Approving a Contract Allocating Utility Service Territory. (UA 37)

and

In the Matter of the Application of PACIFIC POWER & LIGHT COMPANY and PORTLAND GENERAL ELECTRIC COMPANY for an Order Approving a Contract Allocating Utility Service Territory and an Order Approving the Transfer of Rights Acquired by Allocation of Territory. (UA 41)

ORDER
No. 92-557

[Entered
April 16, 1992]

DISPOSITION: TERRITORIAL ALLOCATION CONFIRMED

TABLE OF CONTENTS

PROCEDURAL HISTORY 3

BACKGROUND 5

UA 37 9
Commission Jurisdiction 9
Declaratory Ruling 9
Authority Within Cities 10
District Court Ruling 13
The 1972 Agreement, Application, and Order 13
Order No. 72-870 13
Discussion 16
Exclusive Territorial Allocation 23
Disposition of UA 37 27

UA 41 27
The 1991 Allocation Agreement 27
Service to Columbia Steel 29

PROCEDURAL HISTORY

On July 2, 1990, PGE filed a three-part application with the Commission relating to territorial allocation of electric service in the City of Portland. In part one, PGE asks the Commission to issue a declaratory order affirming that Commission Order No. 72-870, issued in docket No. UF 2947 on December 15, 1972, allocated exclusive territory to PGE in the city. In part two, PGE asks the Commission to issue an order approving a 1972 agreement between PGE and PP&L allocating certain territory in the city to PGE. In part three, PGE asks the Commission to now allocate certain territory in Portland to PGE on the basis of years of continuous service to that area, pursuant to ORS 758.435. PGE also requests that the Commission treat each of its applications separately and independently. That three-part application was assigned docket number UA 37.

On October 2, 1991, PGE and PP&L jointly filed two applications relating to territorial allocation of electric service in the City of Portland. In one application, they ask the Commission to issue an order approving a 1991 contract allocating electric service territory and customers in and around the City of Portland. In the other application, they ask the Commission to issue an order approving the transfer of the right to provide electric service to Columbia Steel from PGE to PP&L. Those two applications were assigned docket number UA 41.

These cases present several issues relating to the allocation of service territory among those who provide electric utility service to the public in Oregon. These two dockets are consolidated pursuant to OAR 860-14-025; the issues overlap and considering them together is the most efficient and logical approach.

Columbia Steel, the Oregon Committee for Equitable Utility Rates (OCEUR), the Oregon Committee for Fair Utility

Rates (OCEUR), Elf Atochem North America, Inc. (Atochem), and the Columbia River People's Utility District filed petitions to intervene as parties in UA 37. They have been granted party status. The Oregon Rural Electric Cooperative Association filed a petition to intervene as an interested person in UA 37, and Atochem filed a petition to intervene as a party in UA 41. Those petitions were granted. The names and addresses of the parties and those who appeared in their behalf are listed on Appendix C to this order.

Atochem raised a new issue in its petition to intervene in UA 37. Its "proposed answer, protest, and counterapplication" discussed Commission Order No. 82-334, in which the Commission approved the sale to the Bonneville Power Administration (BPA) of PGE's substation and transmission facility serving the Atochem plant in Portland. Atochem asserted that the order removed the Atochem plant site from any effect of Order No. 72-870. It further asserted that the conduct of PGE, BPA and Atochem since 1982 has been consistent with the position that Atochem was not a part of PGE's service territory.

Numerous pleadings were filed and rulings issued between June 21, 1990, and February 14, 1992. Lowell Bergen, a Hearings Officer for the Commission, presided over procedural conferences on August 8, 1990 and December 19, 1991. The parties engaged in extensive settlement negotiations, and settled several disputed issues.

At the December 19, 1991 prehearing conference, the parties and Hearings Officer agreed that the parties' positions and arguments had been adequately presented in the filed pleadings and that an evidentiary hearing would not be necessary or helpful on any issue except as to the effects of Order No. 82-334. It may be necessary to hold an evidentiary hearing on the effects of that order. There is, however, no reason to delay a decision on the rest of the issues in UA 37 and UA 41 pending an evidentiary hearing on the 1982

transactions. Pursuant to ORS 756.528, the Commission will segregate the issues surrounding the 1982 order, pending a possible evidentiary hearing. The Commission will resolve the rest of the issues in these dockets in this order.

BACKGROUND

PGE and PP&L have provided electric utility service to Oregonians for many years. Their service in the Portland area is at issue in this proceeding. The central dispute is whether PGE and PP&L have been granted, or should be granted, exclusive territorial allocations in Portland. The applications ask the Commission to state the effect of a previous Commission order and to allocate territory prospectively.

In 1961, PGE and PP&L served overlapping and scattered territories in Portland. Where two or more electric utilities serve the same area, each must build substations, install transformers, and string lines to customers. The result is an inefficient and unsightly duplication of facilities. In some areas of Portland, for instance, utility poles bore eight or nine power lines, several from each company. The density of those lines also created a safety hazard for utility employees who had to repair them.

The 1961 Legislative Assembly addressed these problems by adopting SB 487, now codified in ORS 758.400 to 758.475. ORS 758.405 states the purpose of the statutory scheme:

> The elimination and future prevention of duplication of utility facilities is a matter of state-wide concern: and in order to promote the efficient and economic use and development and the safety of operation of utility services while providing adequate and reasonable service to all territories and customers affected thereby, it is necessary to regulate in the manner provided in ORS 758.400 to 758.475 all persons and entities providing utility services

The statutes create a regulatory framework for the allocation of territories to utility service providers. They establish two ways in which the Commission may approve exclusive service territory allocations. ORS 758.410 to 758.425 establish the first method: a utility and its neighboring utility may agree to a mutual service territory boundary and execute a contract allocating territories and customers between them. That contract must be filed with the Commission. If, after notice and hearing, the Commission determines that the contract will eliminate or avoid unnecessary duplicating facilities, it may approve the contract. ORS 758.435 to 758.440 establish the second method: if a utility is the exclusive provider of utility service in an area, the utility may unilaterally file an application with the Commission to obtain exclusive service territory. The Commission may approve that application after notice and a hearing. ORS 758.450 prohibits others from offering to provide or providing utility service in an allocated territory. The statute also prohibits other providers from offering or providing service in an area for which another provider has filed an application for an exclusive territorial allocation.

After SB 487 was passed, PGE and PP&L began the process of disentangling their duplicative facilities in Portland, In 1962, PGE filed an application to define its service territory throughout Oregon, including its territory in Portland. The Portland City Council passed a resolution opposing the application. PGE amended its application to exclude an allocation in Portland and the City Council withdrew its objection to the application. On January 21, 1963 the Commission issued Order No. 39026 in docket No. UF 2342 that did not allocate territory in Portland.

PGE and PP&L continued to negotiate about how to eliminate duplication of facilities in Portland. In 1965, as downtown Portland was developing, the City Council saw the desirability of installing underground electric utility facilities. The Council, in Ordinance Nos. 120617 and 120662, found that the conversion to underground electric service would be

facilitated if the electric utilities arranged their facilities within designated areas which each utility would serve exclusively. Such exclusive service, the Council found, would provide economies to the companies and would be in the public interest. The utilities drafted an agreement providing for the exchange of distribution facilities in 1966, and the Commission approved the agreement in Order No. 42751. Both the agreement and the order mention that the facilities exchange will, in accord with the ordinance, result in exclusive service areas for each utility. The order characterizes the application for approval of the agreement as being brought under ORS Chapter 757.

In 1972, PGE and PP&L concluded their negotiations with respect to separation of facilities in northeast Portland. They had also negotiated a transfer to PGE of PP&L's allocated territory in the Rainier service district in Columbia County and a transfer to PP&L of PGE's allocated service territory in the City of Maywood. The utilities submitted their plan to the City Council, noting in their cover letter that implementing the agreement would result in a "total separation of all electric utility facilities in the city."

The City Council approved the utilities' plan in Ordinance No. 134416. According to the ordinance, the purpose of the plan was to reduce the visual impact of duplicate facilities, to promote safety, economy, and subsequent undergrounding, and to work toward the lowest possible rates for consumers. The ordinance does not mention exclusive service territories. The utilities entered into an agreement for the exchange of facilities and the transfer of customer accounts on July 18, 1972.

By Order No. 72-870, the Commission approved the agreement. The order notes that the Rainier service district area was an exclusively served area previously allocated to PP&L by Commission Order No. 38498 (October 16, 1962). Order No. 72-870 transfers that exclusive allocation from PP&L to PGE. Neither the utilities' agreement nor the Commission's order mentions exclusive service territories for the Portland exchange.

In 1977 PGE and PP&L entered into an agreement permitting PGE to serve street-lighting fixtures in PP&L's service territory. This was the last transaction in the utilities' elimination of duplicate facilities in Portland.

Columbia Steel operates a manufacturing facility in Portland, an area in which PP&L transferred facilities and customers to PGE under the 1972 order. Since before 1972, Columbia Steel has purchased all of its electricity from PGE under an agreement that is automatically renewed each year unless one party provides the other with timely written notice of termination.

In 1989, Columbia Steel and PP&L entered into negotiations to permit Columbia Steel to purchase its electric power from PP&L rather than PGE. PP&L owns a transmission line that crosses Columbia Steel's plant site. In April, 1990, PP&L notified Columbia Steel that it would offer it a power contract. PGE then notified Columbia Steel that PP&L could not lawfully furnish electricity to Columbia Steel, because Columbia Steel was within PGE's exclusive service territory and service to Columbia Steel by PP&L would constitute a breach of the 1972 agreement between the utilities.

PP&L and Columbia Steel each filed actions in Federal District Court asking for a judicial declaration of the rights and obligations of PP&L, PGE and Columbia Steel under the 1972 agreement and order, among other things. The cases were consolidated in Case No. 90-592. PGE then filed its applications in UA 37, asking the Commission to interpret the 1972 order as a territorial allocation, to now approve the 1972 agreement between the utilities, and to allocate to PGE the territory at issue in the 1972 order on grounds of its past exclusive service to that territory.

On July 3, 1991 the District Court judge ruled on Columbia Steel's and PGE's cross motions for summary judgment. The court ruled against PGE and granted Columbia's motion in

part. Columbia alleged, among other things, that 1972 agreement and order did not constitute a territorial allocation and that the doctrine of state action does not immunize PGE from federal antitrust liability under the Sherman Act. The court ruled that Columbia is entitled to a declaration that Order No. 72-870 did not approve a territorial allocation and neither empowers nor authorizes PGE to monopolize the service of electric power to Columbia. It is also held that the 1972 agreement and order did not immunize PGE from antitrust liability under the doctrine of state action.

This order will address the issues raised by the parties, starting with challenges to the Commission's jurisdiction.

UA 37

Commission Jurisdiction.

Columbia Steel mounts three challenges to Commission jurisdiction. First, it challenges the Commission's authority to issue a declaratory ruling on the meaning and effect of Order NO 72-870. Second, it asserts that the Commission has no authority to allocate territory within the City of Portland. Third, it maintains that the District Court ruling deprives the Commission of authority to interpret the 1972 order and agreement as a territorial allocation.

> **Declaratory Ruling.** ORS 756.450 provides, in relevant part:
>
> On petition of any interested person, the commission may issue a declaratory ruling with respect to the applicability to any person, property, or state of facts of any rule or statute enforceable by the commission.

Columbia maintains that because Order No. 72-870 is not a rule or statute, it may not be the subject of a declaratory ruling.

The documents creating this proceeding and the various judicial proceedings were filed because of controversies surrounding the meaning of Order No. 72-870. The Commission cannot resolve the controversies raised in this proceeding without determining the meaning of Order No. 72-870. More importantly, the Commission must regulate utility service for the benefit of the public. Part of that obligation concerns the allocation of service territories. That obligation includes determining which utilities should provide service to the various portions of the state's largest metropolitan area.

Whether the Commission's authority to decide the meaning of Order No. 72-870 arises from the declaratory ruling statute or the statutes, such as ORS 756.515, authorizing the Commission to investigate any matter relating to utilities and to regulate utilities [illegible] settle relevant disputes presented to it is unimportant. The parties, including Columbia Steel, have raised issues concerning that order. Those issues must be resolved.

Authority Within Cities. Columbia Steel has challenged the Commission's jurisdiction to grant exclusive franchises within Portland. ORS 758.470(1) provides that the allocation statutes "shall not be construed or applied to restrict the powers granted to cities to issue franchises." The Portland city charter provides that "[n]o exclusive franchise shall be granted." Portland City Charter Sec. 10-206. While the term "exclusive franchise" is not defined in the charter, it is commonly understood to mean the right to do business without competition. None of the parties challenges that definition[1]. A territorial allocation to a utility would constitute an exclusive franchise.

---

[1] In its reply to Columbia Steel's motion to dismiss, PGE challenges what it characterizes as Columbia Steel's definition of "franchise" as denoting the right to do business without competition. Columbia Steel was not discussing the meaning of "franchise" but of "exclusive franchise."

Columbia Steel argues that the Portland city charter prohibition of exclusive franchises, together with the statutory reservation of powers, precludes the Commission form allocating exclusive service territories within the city, regardless of any statewide policy to eliminate duplicative facilities. Such an allocation, Columbia Steel contends, would foreclose the city's right to choose which utilities will serve it and under what conditions they will serve.

The City of Portland did not intervene in this proceeding.

To read the statute to prohibit the Commission from granting exclusive territorial allocations within cities would frustrate the clear intention of the statute to eliminate duplicating facilities statewide. A large portion of utility service is delivered to customers in cities. If cities were excluded from the commission's allocation authority, the Commission would have only a minor role in implementing the statutory framework. There would not be a central authority overseeing the elimination of duplicate utility facilities within the state.

Moreover, the legislative history of the statutes demonstrates the legislature's intent to provide for territorial allocation within cities. When SB 487, which became the territorial allocation statutes, was under consideration, the League of Oregon Cities proposed an amendment to exempt all territory within the limits of an incorporated city from the allocation scheme. The proposed amendment stated:

> Nothing in this act shall apply to territory or utility service or facilities within the limits of incorporated cities as they now exist or hereafter extended.

Proposed amendment, House Planning and Development Committee, April 11, 1961. The amendment was rejected.

The territorial allocation statutes and the statute protecting franchise rights have been applied in harmony through the

years. Cities exercise their franchise right when they grant or deny individual utilities the right to provide service within their city boundaries. The commission grants or denies applications for exclusive territorial allocations. A utility company needs authority from a city to provide service in the city and needs approval from the Commission to operate exclusively in a territory. That practice accommodates the cities' right to control who provides utility service within their boundaries and the Commission's authority to grant exclusive territorial allocations to implement the statewide policy of eliminating duplication. The provisions in ORS Chapter 758 that authorize the Commission to allocate exclusive service territories and reserve the franchise rights to cities do not conflict.

Even if a city charter and the Commission's authority to allocate service territories did conflict, the Commission's authority, vested in it by the legislature, is paramount over that of a city. The legislature governs matters of statewide concern; local governments have control over matters of purely local concern. *State ex rel. Heinig v. Milwaukie*, 231 Or 473, 479, 373 P2d 680 (1962). The state policy to eliminate duplicative facilities takes precedence over any city policy to the contrary. That is consistent with the broad powers vested in the Commission by ORS 756.040(2):

> The commission is vested with power and jurisdiction to supervise every public utility, railroad, air carrier and motor carrier in this state, and to do all things necessary and convenient in the exercise of such power and jurisdiction.

Notwithstanding its city charter, the City of Portland has in the past behaved as though the state scheme was paramount and issued ordinances granting exclusive franchises to electric utilities within its boundaries. *See* Ordinance Nos. 120617 and 120662 (1965) granting exclusive franchises to PGE and PP&L for electric service provided through underground facilities in the downtown area of the city.

Columbia Steel's objection to PGE's second and third applications on the ground that the Commission is not authorized to approve a territorial allocation within the City of Portland is rejected. The Commission concludes that it has authority to approve territorial allocations within cities.

District Court Ruling. Columbia Steel argues that the District Court ruling has deprived the Commission of authority to interpret its 1972 order and the agreement it approved. It bases its contention on its understanding that federal antitrust laws now apply to the agreements and order. The scope of the District Court ruling, however, is much narrower than Columbia Steel contends. In a ruling in the antitrust proceeding before it, the court ruled that Columbia Steel is "entitled to a declaration [from the court] that Order No. 72-870 of the PUC neither empowers nor authorizes PGE to monopolize the service of electric power to Columbia." The court did not find PGE guilty of an antitrust violation; that question is still pending. Its ruling merely may foreclose one avenue of defense against an antitrust claim. The court's ruling was not intended to, nor did it deprive the Commission of jurisdiction over the issues in this docket.

The 1972 Agreement, Application and Order

Order No. 72-870

Both dockets before us were opened as a result of the uncertainly of the parties about the effect of Order No. 72-870. Before we address the individual applications in these dockets, we will discuss the 1972 order and the documents underlying it to assess its impact on the issues we are to resolve.

The agreement the order approves is dated July 18, 1972, and states that the parties want to eliminate the duplication of electric facilities in the Portland and Rainier areas. It provides for the exchange and transfer of facilities and customer accounts

between PGE and PP&L. The facilities include distribution plant, transmission equipment and real property The agreement provides for the orderly transfer of property and customer accounts, and requires each company to transfer all rights each has in the facilities and account to be transferred (except that PP&L's franchise to operate in Portland is not to be assigned). The agreement states that it is subject to the approval of the Public Utility Commissioner and any other regulatory agency having jurisdiction over the transactions.

As indicated, Pacific agreed to transfer its facilities and customer accounts in parcel C to PGE and PGE agreed to transfer its facilities and customer account in parcels A and B (with certain exceptions) to PP&L. The parties agreed that PP&L would keep its facilities and customer accounts in parcel D. PP&L agreed to transfer its service center, land, and customer accounts in Rainier to PGE. PP&L's Rainier District employees were given the option to become PGE employees.

Appendix A to this order contains legal descriptions of the parcels. Appendix D, page one, is a map of the Portland area showing the four parcels. Appendix D, page two, shows parcels B and D in greater detail.

The agreement refers to the City of Portland Ordinance number 134416, passed on April 26, 1972, which consents to the PGE/PP&L exchange of properties in Portland and Rainier. The ordinance notes that PGE and PP&L hold nonexclusive franchises within the City of Portland and specifies that the obligation to supply properties within the city must remain binding on both utilities. The ordinance makes no distinction between the exchanges in the two cities, calling them both exchanges of property.

On July 25, 1972, PGE and PP&L filed a joint application with the Commission for approval of the proposed exchanges. The caption states that it is an application for approval for the two companies to exchange facilities in Multnomah and

Columbia Counties and to assign to PGE the service territory previously allocated to PP&L in Columbia County. The introductory paragraph says the applicants apply for a Commission order under ORS Chapter 757 authorizing the two companies to exchange facilities in Multnomah and Columbia Counties. Section 1 of the application is entitled DISPOSITION OF FACILITIES and describes the requested exchange between the two companies in Multnomah County. Section II, entitled ASSIGNMENT OF SERVICE TERRITORY, says the application "is further for an order of the Commissioner, pursuant to the provisions of ORS 758.460, approving the assignment to Portland General of all rights acquired by Pacific in and to certain service territory allocated to Pacific as its exclusive service territory by the Commissioner's Order No. 38498 dated October 16, 1962, Docket No. 2332." A description and map show that section II of the application applies to territory in the City of Rainier.

In the statutory scheme for territorial allocation, ORS 758.410 governs allocation by contract between two utilities. That statute provides:

> (1) Any person providing a utility service may contract with any other person providing a similar utility service for the purpose of allocating territories and customers between the parties and designating which territories and customers are to be served by which of said contracting parties; and the territories and customers allocated and designated may include all or any portion of the territories and customers which are being served by either or both of the parties at the time the contract is entered into, or which could be economically served by the then existing facilities of either party, or by reasonable and economic extensions thereto.
>
> (2) Any such contracting parties may also contract in writing for the sale, exchange, transfer, or lease of

> equipment or facilities located within territory which is the subject of the allocation agreed upon pursuant to subsection (1) of this section. Any sale, exchange, transfer or lease of equipment, plant or facilities made pursuant to this subsection by any person which is a "public utility" as defined in ORS 757.005 is also subject to the approval of the commission to the extent required by ORS chapter 757.

ORS 758.420 requires the Commission's approval of a contract between utilities for allocation of service territory.

PGE argues that by the 1972 agreement, application, and order, PGE, PP&L and the Commission intended to and did allocate territory as authorized by ORS 758.410.

Columbia Steel takes the position that the 1972 agreement did not allocate territory but only authorized an exchange of facilities, equipment, and customers. ORS 758.420 authorizes the Commission to approve an agreement "as filed". Therefore, Columbia Steel contends, a Commission order approving a territorial allocation based on the 1972 agreement between PGE and PP&L would have no legal effect. Furthermore, Columbia Steel contends that the Commission cannot now approve the 1972 agreement because ORS 758.420(1) requires the contract to be "promptly" filed with the Commission. While it was promptly filed for the 1972 proceeding, it would not be promptly filed for a proceeding almost 20 years later.

Discussion. The 1972 order characterizes the Portland portion of the application as an application to exchange property under ORS 757.480. That statute provides for Commission approval of the sale, lease, assignment or other disposition of public utility property.

The order and other documents use very different language to describe the facilities exchange in Portland and the territory

assignment in Rainier. The two transactions are different, and that can help explain the difference in language. Rainier had already been allocated to PP&L by Commission Order No. 38498, and was therefore already an exclusively served area. The northeast Portland territory had been served by both utilities and had not yet been allocated to either one. The application and the order both make obvious distinctions between the exchange of facilities under ORS Chapter 757 and the assignment of an allocated service territory under ORS Chapter 758. In describing the transactions, the order states that PGE and PP&L are exchanging facilities and customers in Multnomah County, and are transferring facilities and service territories in Rainier. The concluding paragraph before the ordering paragraphs continues to distinguish the two transactions:

> From the foregoing, it is concluded that the application of Pacific Power & Light Company and Portland General Electric Company should be granted and an order entered approving the transfer of certain exclusively served territory in the Rainier area from Pacific Power & Light Company to Portland General Electric Company and approving the transfer and exchanging of utility property and facilities and customers between the two companies as applied for.

Order No. 72-870 at 8. In the ordering paragraphs, the Commissioner approves the application to transfer exclusively allocated service territory in Rainier from PP&L to PGE, and allows PGE and PP&L to transfer facilities within Multnomah County.

Failure to mention an appropriate statute need not determine the order's effect, however. In 1966, Commission Order No. 42751 approved exclusive service territories for PGE and PP&L in downtown Portland. According to that order, the underlying application there was also for an exchange of facilities under ORS Chapter 757. However, the 1966 order did

explicitly acknowledge that the facilities exchange would result in exclusive service territories, even though it did not refer to the contractual allocation statute.

ORS 758.415 authorizes approval of an agreement for the allocation of territory if the Commission finds:

> that the contract will eliminate or avoid unnecessary duplicating facilities, and will promote the efficient and economic use and development and the safety of operation of the utility systems of the parties to the contract, while providing adequate and reasonable service to all territories and customers affected thereby.

ORS 758.415 itself does not expressly provide that exclusive service territories will be created upon Commission approval of a contract between affected utilities which divides up and separates service territories. However, the section is a part of ORS 758.400 to 758.475 and the legislative purpose of those sections is to create exclusive service territories. Once the findings required by ORS 758.415 are made, the contract must be approved and, without more, exclusive service territories are created by operation of law.

Significantly, the 1972 order recites findings required by ORS 758.415 relating to the elimination of duplicating facilities and the economic and safe use of utility facilities. The order does not expressly find that adequate and reasonable service to the affected territories and customers will be provided, but that finding easily is implied from the order's language. Moreover, the 1972 agreement and order provide for an exchange of customers as well as an exchange of facilities and equipment. ORS Chapter 757 deals only with exchange of facilities; only ORS 758.410 addresses the exchange of customers.

A subsequent Commission administration apparently entertained doubts about the effect of Order No. 72-870,

because in 1976 two memorandums issued by Commission Counsel to the Deputy Commissioner on the topic of PGE-PP&L switchover customers.[2] The first memo, dated March 4, 1976, discusses the effect of ORS 758.435(3), the exclusive service allocation exception, and concludes that utilities in the situation described in that subsection are limited to allocation by contract, under ORS 758.410.

The second memo, dated April 6, 1976, addresses whether Order No. 72-870 is a binding territorial allocation. The memo asserts that because the order recites the requisite findings under ORS 758.415 and deals with the exchange of customers as well as of facilities and equipment, the Commissioner was entertaining the application for approval of the agreement under ORS 758.410 to 758.420

The memo concludes by advising the Deputy Commissioner that the Commission:

> should take the position that Order No. 72-870 was a territorial allocation within Portland, enforceable by the commissioner, PP&L or PGE against encroachment.

At least from that time forward, the Commission did take the recommended position, as shown by the rate cases cited above.

PGE's belief that the 1972 order allocated territory is not unreasonable. As a practical matter, the exchange of equipment, facilities, and customers approved in Order No. 72-870 created service territories for each of the utilities. A service territory is the obvious result of such a division of facilities and customers, and the creation of such territories is the outcome of the utilities' program to disentangle their duplicative equipment.

---

[2] The Commission takes official notice of these memos pursuant to OAR 860-14-050

There is much extrinsic evidence that the Commission and the parties intended a territorial allocation. The record shows that not only the utilities but also the Commission behaved as though the order had allocated territory.

The earliest evidence of the utilities' understanding of the effect of their agreement is a resolution by the Board of Directors of PP&L dated July 26, 1972, but adopted at a meeting held on December 16, 1971. The resolution authorizes the officers of PP&L to enter into a contract with PGE that will provide for the

> transfer to that company of electric transmission and distribution facilities belonging to [PP&L]... *and the allocation of such area to [PGE]*, and the acquisition by [PP&L] of certain electric transmission and distribution facilities belonging to [PGE]... the transfer of facilities and *allocation of area* pursuant to such contract to be subject to the approval of the Public Utility Commissioner of Oregon, the City of Portland and the Federal Power Commission to the extent required by law...(Emphasis supplied.)

A letter from representatives of both utilities to the Public Utility Commissioner dated February 10, 1972, states:

> Our study has resulted in a mutually agreed upon plan whereby each company would *serve specified areas* within the City of Portland. . . . The plan, when put into effect, will immediately discontinue any addition of duplicating electrical facilities and will make possible the removal of existing duplicated facilities in conjunction with future scheduled construction. (Emphasis supplied.)

Both utilities were under the impression that some form of territorial allocation would result from the Commission order.

From 1972 until 1990, furthermore, the parties have behaved as though the 1972 order allocated territory to them. In 1977, PGE and PP&L entered into a street lighting agreement under which PGE was to serve street-lighting fixtures in PP&L's service territory. That agreement was the final separation of equipment and facilities in the program to eliminate duplicative facilities. The agreement recites that both utilities serve metropolitan Portland and have, with regulatory approval, completed transfer of facilities to eliminate duplication within metropolitan Portland. It continues:

> WHEREAS, such agreements provide that [PGE] will provide certain electric service *within the service territory assigned to [PP&L] in the Portland metropolitan area*...(Emphasis supplied.)

If the utilities had not believed that approval of the 1972 contract and the transfer of facilities and equipment created allocated territories, they would not have had to agree that PGE could service street lights within "the service territory assigned to [PP&L]."

As a last example of the utilities' behavior after the 1972 order, PGE and PP&L in their joint application for an allocation in this proceeding state that:

> Since the 1972 Agreement and Order, [PP&L] has not provided service within the geographic areas in Portland where distribution facilities were conveyed to PGE and PGE has not provided service within the geographic areas in Portland where distribution facilities were conveyed to [PP&L].

The Commission also acted as though the utilities had received territorial allocations in Portland. On October 25, 1973, in UF 3001, Order No. 73-688, at 3, the Commission stated:

> [PGE's] present service area is a 3,371 square mile area within a *state-approved service area allocation* of 4,339 square miles, including 54 incorporated cities of which Portland and Salem are the largest. (Emphasis supplied. *See also* Order No. 75-832 at 3 issued in September 1975 and Order No. 79-055 at 3 issued in January 1979.)

In UF 3074, Order No. 74-658 at 2, it wrote:

> In Oregon, [PP&L's] *electric service areas* are scattered over a large part of the state. The company *serves in ...parts of Portland....*(Emphasis supplied. *See also* Order No. 75-704 at 4: Order No. 82-606 at 5; Order No. 83-669 at 3.)

Finally, also in Order No. 74-658 cited above, the Commission rejected PP&L's filing for a tariff applicable only to its Portland customers. Historically, the Commission had allowed PP&L to charge lower rates in Portland so that its rates would be in parity with PGE's. In this rate case it did not allow the tariff, because it found that PP&L was no longer subject to competition in Portland.

> The two companies no longer competitively serve the same area. Their respective *areas of service* within Portland have been defined. Thus, with the lack of competition, the justification for the rate uniformity [with PGE] is said to have disappeared.

Order No. 74-658 at 25, *reh'g or reconsideration denied*, Order No. 74-935, *aff'd sub nom, American Can Co. v. Davis*, 28 Or App 207, 225, 559 P2d 898 (1976) (emphasis supplied).

To summarize, because Order No. 72-870 did not expressly refer to ORS Chapter 758 with respect to future service in Portland under the allocation statues and because the order did not say that exclusive territorial allocations are being created in

Portland, Order No. 72-870, perhaps it did not unambiguously allocate exclusive service territories to PGE and PP&L. However, the order did create boundaries that the utilities observed as if they were allocated territories until Columbia Steel's attempt to switch utilities in 1989. The Commission made the required statutory findings to allocate exclusive service territories and acted as if it had approved a territorial allocation in its 1972 order. The behavior of the utilities and the Commission demonstrates an understanding that exclusive service territories had been created.

For the foregoing reasons, it appears to the Commission that Order No. 72-870 is not a complete and accurate memorial of the 1972 decision of the Commissioner in docket No. UF 2947: the order omits a reference to the statute under which its findings were actually made when the Commissioner approved the PGE/PP&L contract. Pursuant to ORS 756.568, the Commission will amend Order No. 72-870, nunc pro tunc, to conform to the actual decision intended and followed. The details of the amendment are shown in the ordering paragraphs in this order.

Exclusive Territorial Allocation

PGE requests that the Commission grant it a territorial allocation based on exclusive service to an area under ORS 758.435.

ORS 758.435 provides, in relevant part:

> (1) Any person providing a utility service in a territory that is not served by another person providing a similar utility service may make application to the commission for an order allocating such territory to it....
>
> (2) The commission shall within 30 days after the filing of such application give notice of the filing. If

> the commission chooses, or if a customer requests a hearing on the matter within 30 days of the notice, the commission shall hold a hearing by telephone or in person. The commission shall give notice of the hearing within 30 days of the request which notice shall set the date and place of hearing. The hearing shall be held at a place within or conveniently accessible to the territory covered by the application. Notice of the filing shall be by publication in a newspaper or newspapers for general circulation in the territory covered by the application and shall be published at least once weekly for two successive weeks. Written notice of the filing shall be given to providers of similar utility service in adjacent territory.
>
> (3) Territory within the limits of a city, as fixed on May 31, 1961, shall not be deemed to be served exclusively by any person, if such city is, on such date, served by more than one person having necessary municipal or franchise authority to serve within the entire city.

Columbia Steel argues that, because PGE and PP&L both had authority to serve the entire City of Portland as of May 31, 1961,[3] neither can be deemed to be serving territory

---

[3] PGE takes issue with this assertion of Columbia's. It contends that Columbia Steel has not met its burden of showing that "more than one person [had] necessary municipal or franchise authority to serve within the entire city" on May 31, 1961. The parties agreed that the Commission would make a decision based on the record submitted to the Hearings Officer and anything of which he could take official notice. Based on a preponderance of the evidence in the record, the Commission concludes that both utilities were franchised to serve the entire city on the date in question. *See, e.g.*, Brief of City of Portland in Commission docket No. UF 2342 (1962) opposing PGE's application for exclusive service territory within the City of Portland. Exhibit H to Columbia Steel's motion to dismiss, at 6-7; Section 1 of City of Portland Ordinance No. 134416 consenting to the exchange of property within the city limits of Portland between PGE and PP&L (1972).

exclusively. ORS 758.435(3). It argues that "deemed" implies the whole decision making process whereby territory might be allocated under this statute. There is, therefore, no basis for a territorial allocation under ORS 758.435. Columbia's position is that no utility may ever obtain a territorial allocation within a city based on exclusive service if, on May 31, 1961, the city was served by more than one utility having authority to serve within the entire city.

PGE argues that ORS 758.435(3) applies only to the preliminary finding of exclusive provider status. PGE argues that subparagraph (3) merely requires utilities that serve in cities that have granted more than one franchise to make an affirmative showing that they are, in fact, exclusive providers. PGE urges the Commission to read subsection (3) in the context of the whole act and to construe it narrowly because it is an exception. A narrow construction would read "deemed" to indicate a preliminary finding, not a permanent ban on this form of allocation to affected utilities.

Commission staff joins PGE's position. It argues that ORS 758.435(3) does not bar a grant of territorial allocation based on exclusive service in cities that have franchised more than one utility. According to staff, the provision means that there can be no presumption that a utility which is, in fact, exclusively serving an area of the city is entitled to allocation of that territory based on ORS 758.435. If, however, no other utility within the city objects to allocating such territory under ORS 758.435 and the city itself does not object, the Commission can allocate territory to a utility as an exclusive provider. Both PGE and staff assume that ORS 758.435(2) describes the procedure by which an affected utility would gain a grant of territorial allocation as an exclusive service provider.

The Commission finds that ORS 758.435(3) bars a grant of territorial allocation under ORS 758.435 to utilities serving cities that were served on May 31, 1961, by more than one person with the authority to serve the entire city. Regardless of

which implication a reader gives to the word "deemed," the sense of its clause is clear: no utility in that situation meets the threshold requirement for allocation of territory on the basis of exclusive service. This reading is consistent with the assertions of all three parties. However, the Commission disagrees with staff and PGE when they go on to say that if a utility described in subsection (3) goes through the approval procedure in ORS 758.435(2), it overcomes that initial status and may be allocated territory as an exclusive service provider.

PGE correctly urges the Commission not to read a subsection in isolation. The structure of ORS 758.435 in its entirety gives an important indication as to the proper reading of its subsection (3). The first subsection describes a class of utilities, those serving in territories where there is no other service provider. The second subsection establishes a set of procedures utilities must pursue to receive a territorial allocation as exclusive service providers. The third subsection describes a second class of utilities, those serving in municipalities that have franchised more than one utility to serve throughout the city as of a certain date. The fact that subsection (3) follows the procedural subsection indicates that the procedures do not apply to the utilities it describes. The subsection is at the end of the statutory section because it functions to except its class of utilities from the possibility of territorial allocation as exclusive service providers. No procedures are provided by which the utilities it describes can be considered exclusive service providers, and the position of the subsection signals that the preceding subsection does not apply to it.

This reading is not, as PGE contends, at odds with the legislature's object and policy. Instead it permits utilities to divide territory by contract, under ORS 758.410, subject to Commission approval

The Commission concludes that PGE may not be granted its requested territorial allocation as an exclusive service provider under ORS 758.435.

Disposition of UA 37

The Commission declines to allocate exclusive territories in Portland to PGE and PP&L based on their providing exclusive service in the city. However, the Commission finds that the Commission intended to allocate exclusive service territories within Portland in 1972 in Order No. 72-870 in UF 2947. In this order the Commission is amending Order No. 72-870; therefore, PGE's request for a declaratory ruling on the 1972 order and its request for approval of its 1972 contract with PP&L are moot.

UA 41

On October 2, 1991, PGE an PP&L submitted an application pursuant to ORS 758.420 and OAR 860-25-101 for approval of a contract allocating utility service territory and customers in and around the City of Portland. The application also requests the transfer of PGE's rights to serve Columbia Steel. These matters were docketed as UA 41.

Pursuant to ORS 758.420, the Commission published notice of the contract on February 26, 1992. No customer requested a hearing within 30 days of the notice, and the Commission does not choose to schedule additional events.

The 1991 Allocation Agreement

The 1991 Allocation Agreement contractually allocates territories and customers in the City of Portland in the boundary areas set forth in the 1972 agreement. The parties note that they filed their application to resolve the uncertainty created by the District Court's order in Case No. 90-592 about whether the 1972 agreement and order created allocated service territories. The parties filed their application expressly without waiving the right to assert that allocated service territories were validly created in 1972.

The joint PGE/PP&L application is for approval of an agreement between them dated September 30, 1991. Under that contract, the utilities agree pursuant to ORS 758.410 that the area described as Parcels A, B, and D in the 1972 agreement and all customers within those parcels shall constitute territory allocated to PP&L. PP&L currently serves all customers located in those parcels. The utilities further agree that the area described as Parcel C in the 1972 agreement and all customers in that area shall constitute territory allocated to PGE. PGE currently serves all customers in that parcel. See Appendix A to this order for a description of the parcels and Appendix D for maps of the parcels.

No sale, exchange, transfer, or lease of equipment, plant, or facilities will be necessary under this application.

OAR 860-25-010(1) to (4) require applicants for approval of allocation agreements under ORS 758.410 to provide maps of their service areas and the location of their customers, metes and bounds descriptions of the boundaries of the territory to be served by each party, and descriptions of the equipment and facilities of each party to be sold, exchanged, transferred, or leased under the contract. OAR 860-25-010(5) provides that the application must also contain:

> Facts showing that the contract will eliminate or avoid unnecessary duplicating facilities, and will promote the efficient and economic use and development and the safety of operation of the utility systems of the parties to the contract while providing adequate and reasonable service to all territories and customers affected thereby.

PGE and PP&L each ask for allocation of areas that they have served since the facilities and customer exchange of 1972. An allocation of those territories would avoid unnecessary duplication of facilities and meet the efficiency, economy and safety concerns of the rule and statute. If the Commission

approves the application, the affected territories and customers would experience no change in service. That service is adequate and reasonable.

The only objection to the application is by Atochem. It does not want any allocation to adversely affect its claim that events in 1982 take it out of any allocated territory. That issue will be addressed in the segregated portion of this proceeding.

This order resolves the controversies surrounding the 1972 events by confirming the previous allocations. However, while the issues are resolved as far as the Commission is concerned, the matter is still being litigated in other forums. To resolve any future ambiguity about the status of territorial allocations in Portland, the commission will include in this order a decision on the merits of the joint PGE/PP&L 1991 application in UA 41. The requirements of ORS 758.410 and OAR 860-25-010 have been satisfied and the Commission approves PGE's and PP&L's 1991 contract for allocation of territories and customers in Portland,

Service to Columbia Steel

In UA 41, PGE and PP&L also apply for an order approving the transfer of rights acquired by allocation of territory. Specifically, they apply for transfer to PP&L of PGE's right to serve Columbia Steel, pursuant to ORS 758.460 and OAR 860-25-027. In October of 1989, Columbia Steel, a PGE customer, requested that PP&L provide it with electric service. That request led to litigation in the federal district court and to these applications to the Commission.

In an effort to resolve a major portion of the litigation, PGE and PP&L entered into a settlement agreement. The allocation agreement discussed above is part of the settlement, as is PGE's consent to transfer to PP&L the right to serve Columbia Steel. PGE has agreed to deliver power to PP&L from its Portsmouth Substation until October, 1993, at the

latest, while PP&L constructs the facilities needed to serve Columbia Steel form PP&L's transmission line near Columbia's site.

ORS 758.460 provides that a transfer of rights acquired by territorial allocation is subject to Commission approval and that approval is to be granted if the transfer is not contrary to the public interest. In this order, the Commission approves PGE and PP&L's application for territorial allocation within the City of Portland.

The Commission also concludes that the transfer of rights is not contrary to the public interest. This transfer is part of a larger settlement that resolves much of the dispute about the effect of Order No. 72-870. It thus falls within the public policy favoring the compromise and settlement of disputes. The transfer, as designed by the parties, will not cause any short-term disruption of service to Columbia Steel, and it will meet Columbia's long-term needs for electrical service. The transfer is not likely to have adverse effects on PGE's or PP&L's ability to serve their other customers.

The agreement covering the transfer of rights meets the criteria of OAR 860-25-027.

CONCLUSIONS

It is concluded that:

1. The application filed and docketed as UA 37 should be granted in part and Order No. 72-870 should be amended nunc pro tunc;

2. The application filed and docketed as UA 41 should be granted;

3. The rights to serve the electric needs of Columbia Steel should be transferred from PGE to PP&L;

4. The 1991 Allocation Agreement between PGE and PP&L should be approved and territories allocated accordingly.

ORDER

IT IS ORDERED that:

1. Order No. 72-870 is hereby corrected by striking the following paragraph from page eight:

> "From the foregoing, it is concluded that the application of Pacific Power & Light Company and Portland General Electric Company should be granted and an order entered approving the transfer of certain exclusively served territory in the Rainier area from Pacific Power & Light Company to Portland General Electric Company and approving the transfer and exchanging of utility property and facilities and customers between the two companies as applied for. It is therefore"

and substituting the following language:

> "From the foregoing, it is concluded that the applications of Pacific Power & Light Company and Portland General Electric Company should be granted, and an order entered as follows:

1. Under ORS 758.460, approving the transfer of certain exclusively served territory in the Rainier area for Pacific Power & Light Company to Portland General Electric Company.

2. Under ORS 758.425, approving the agreement of the companies, which separates service territories and transfers affected customers: and

3. Under ORS 757.480 approving the exchange of assets and facilities to implement these transactions. It is therefore"

2. The correction to Order No. 72-870 is hereby entered nunc pro tunc as of December 15, 1972, the date when the decision was originally made and entered;

3. The applications filed by PGE and PP&L on October 2, 1990, docketed as UA 41, are granted;

4. The 1991 Allocation Agreement between PGE and PP&L allocating territories and customers within the City of Portland is approved;

5. The exclusive territorial allocation to the areas described as Parcels A, B and D of Appendix A to this order is confirmed to PP&L;

6. The exclusive territorial allocation to the area described as Parcel C of Appendix A to this order is confirmed to PGE.

7. The rights to serve the electric needs of Columbia Steel within the areas described in Appendix B to this order are transferred form PGE to PP&L;

8. The impacts of Commission Order No. 82-334 will be decided in a future Commission order.

Made, entered and effective April 16, 1992.

/s/_____
Ron Eachus
Chairman

/s/_____
Myron B. Katz
Commissioner

/s/_____
Joan H. Smith
Commissioner

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A party may appeal this order pursuant to ORS 756.580.

APPENDIX A

Territory allocated to PP&L:

Parcel A:

Beginning at the point of intersection of the South line of the North Portland Harbor with the centerline of the Pacific Highways [continued metes and bounds description of parcel].

Parcel B:

Beginning at the point of intersection of the extended centerline of S.W. Jefferson Street with the centerline of Pacific Highways [continued metes and bounds description of parcel].

Parcel D:

Beginning at a point on the centerline of S.W. Market Street at its intersection with the centerline of S.W. First Avenue [continued metes and bounds description of parcel].

Territory allocated to PGE

Parcel C:

Beginning at a point on the Oregon-Washington State line and an extension of the East side of Sundial Ranch Road [continued metes and bounds description of parcel].

APPENDIX B

Meets and Bounds Description of Columbia Steel Casting Co. plant site and adjacent property

Parcel 1: [Omitted].

APPENDIX C

[omitted]

92-557

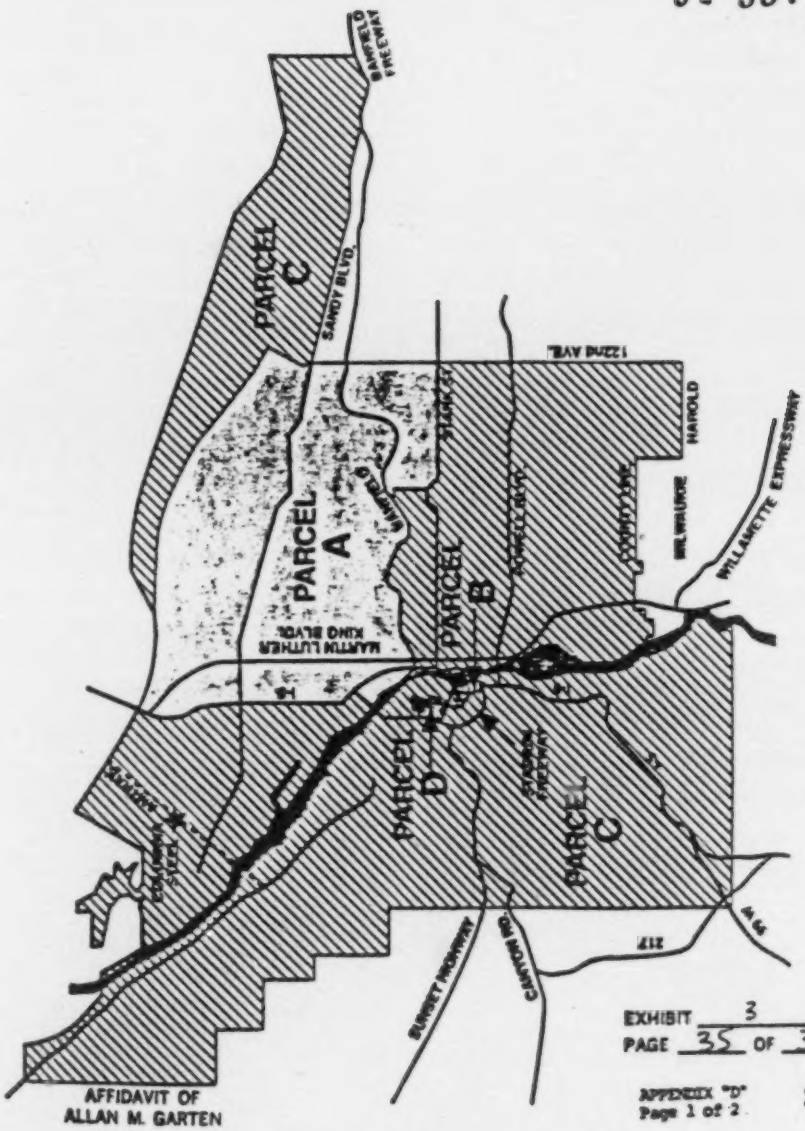

EXHIBIT 3
PAGE 35 OF 36

APPENDIX "D"
Page 1 of 2

263

APPENDIX N

APPENDIX N

BEFORE THE PUBLIC UTILITY COMMISSIONER

OF OREGON

UA 37
UA 41

In the Matter of the Application of Portland General Electric Company for a Declaratory Order, an Order Allocating Exclusively Served Territory, and an Order Approving a Contract Allocating utility Service Territory. (UA 37)

and

In the Matter of the Application of PACIFIC POWER & LIGHT COMPANY and PORTLAND GENERAL ELECTRIC COMPANY for an Order Approving a Contract Allocating Utility Service Territory and an Order Approving the Transfer of Rights Acquired by Allocation of Territory. (UA 41)

O R D E R
No. 92-1135

[Entered August 7, 1992]

DISPOSITION: PETITION FOR RECONSIDERATION DENIED

On April 16, 1992, the Commission issued Order No. 92-557, resolving the issues raised in docket Nos. UA 37 and UA 41[1]. On June 15, 1992, Columbia Steel Casting Co., Inc. filed a petition for reconsideration of the order. On June 30, 1992, Portland General Electric Company (PGE) filed a response to the petition.

Columbia Steel lists two principal reasons why it wants the Commission to reconsider Order No. 92-557. The first is that the Commission lacks authority to either amend or interpret Order No. 72-870. The second is that, in spite of its repeated requests and over its objections, Columbia Steel was denied the opportunity for a hearing.

Commission Authority as to Order No. 72-870.

In Order No. 92-557, the Commission found that Order No. 72-870 was not a complete and accurate memorial of the Commissioner's decisions in docket No. UF 2947, and amended a paragraph to accurately reflect the decisions made in 1972. Columbia Steel argues that the Commission lacks authority, as a matter of law, to amend Order No. 72-870 *nunc pro tunc*. Columbia Steel argues that a *nunc pro tunc* order can only correct clerical errors, not errors made in rendering the decision. Columbia Steel also argues that the Commission has no authority to interpret one of its orders.

The correction to Order No. 72-870 supplied missing statutory citations to clarify the decisions made. The correction does not give retroactive effect to Order No. 92-557, but conforms Order No. 72-870 to the actual decisions made and followed. It is within the Commission's authority to enhance stability in the utility industry by explaining and clarifying its previous decisions. While the wording of Order No. 72-870

---

[1] One issue was reserved for later determination, but is not relevant to the issues discussed in this order.

might have been clearer in some respects, there was no doubt as to its substance.

ORS 756.040 authorizes the Commission to regulate and supervise utility companies and to do all things necessary or convenient in exercising its authority. ORS 756.515 authorizes the Commission to investigate, on its own motion, any matter relating to a utility company. As a practical matter, the Commission must construe, consider, and enforce its own orders. The Commission rejects the notion that it is impotent to interpret, amend, or otherwise revisit its previous orders.

Opportunity for a Hearing.

Columbia Steel contends that it "has repeatedly requested a hearing in this proceeding, but no hearing was granted." Columbia Steel does not support its contention by any references to documents or other parts of the file of this proceeding that might contain such repeated requests. Columbia Steel entered this proceeding by filing a motion to dismiss the UA 37 application. Columbia Steel's motion did not request a hearing. Next, Columbia Steel filed a reply to PGE's response to Columbia Steel's motion. Columbia Steel's reply did not request a hearing. Later, Columbia Steel filed a memorandum supporting its motion to dismiss. The memorandum did not request a hearing. Those were the major documents Columbia Steel filed prior to the Commission issuing Order No. 92-557. A review of the pleadings, record, and file does not reveal requests for a hearing.

Even if Columbia Steel had requested a hearing, it agreed on the record that the documents filed in this proceeding constituted an adequate and sufficient record for the Commission's decisions. Order No. 92-557 was based on that record.

PGE's application in UA 37 is in three parts: a request that the Commission issue a declaratory ruling stating that

Commission Order No. 72-870 allocated exclusive territory to PGE within the City of Portland; a request that the Commission issue an order approving a 1972 agreement between PGE and Pacific Power & Light Company (PP&L) allocating service territory within the City of Portland; and, a request that the Commission allocate territory within the County of Portland based on years of continuous service. Columbia Steel filed a motion to dismiss the application, on the grounds that the Portland City Charter and state statutes prohibit territorial allocation within Portland, that the 1972 PGE/PP&L contract and the 1972 Commission allocation proceeding are an inadequate basis for an allocation, and that the Commission lacks authority to issue the requested declaratory order.

The Hearings Officer conducted two conferences on procedural matters. Columbia Steel was represented by counsel at both conferences. At the first conference, on August 8, 1990, counsel for PGE and the Commission's staff stated that they thought the disputes were primarily legal. Columbia Steel stated that its position was that the proceeding was not needed because the Commission lacked jurisdiction to allocate territory within the City of Portland. Counsel for Columbia Steel stated that Portland's City Charter and state statute prohibited territorial allocations within Portland. Columbia Steel's position was, of course, based on its interpretation of the law. The Hearings Officer asked the parties to discuss the issues and specifically to attempt to draft an agreed statement of facts to provide a framework upon which the legal issues could be decided.

At the start of the second conference, on December 19, 1991, the Hearings Officer asked the parties for a report on their negotiations. Staff counsel stated that extensive negotiations had occurred and the parties had agreed that the record was complete, no additional evidence was desired, and the matter was ready for decision (except for one issue not relevant here). Mountains of documents had been filed in pleadings and briefs, and the Hearings Officer took that

statement to mean that the information in those documents would form the basis for the Commission's decisions in all but one issue in the two dockets. So he summarized the major kinds of documents filed in the dockets and asked the parties for comments. Counsel for PGE responded that the parties had discussed in their negotiations whether to supplement the record and had agreed that the documents already filed were sufficient. The Hearings Officer asked if any party objected to the Commission basing its decisions on the documents already filed. No objection was voiced. Counsel for Columbia Steel did state that he did not want to stipulate that the utilities had faithfully provided exclusive service in the areas they claimed as theirs within Portland, because there may have been exceptions. The Commission in Order No. 92-557 declined to allocate territory on the basis of exclusive service by the utilities.

Columbia Steel's claim that it was denied an evidentiary hearing over its objections is without merit. The record on which Order No. 92-557 is based is adequate to rule on Columbia Steel's motion to dismiss and to make the decisions required by the applications in UA 37 and UA 41.

Other Issues.

Within the two principal reasons Columbia Steel gives for the requested reconsideration, Columbia Steel argues many other points. Most of them were considered and addressed in Order No. 92-557. Columbia Steel sent additional documents with its petition for reconsideration, many of which are copies of depositions of people who have opinions about events relating to the 1972 allocation order. In response, PGE also filed copies of depositions of people with knowledge of the 1972 allocation matters. The additional material does not show that Order No. 92-557 should be reconsidered or was in error.

IT IS ORDERED that the petition for reconsideration filed by Columbia Steel Casting Co., Inc., on June 15, 1992, is denied.

Made, entered and effective August 7, 1992.

/s/ _____
Ron Eachus
Chairman

/s/ _____
Joan H. Smith
Commissioner

_____
Roger Hamilton
Commissioner

A party may appeal this order pursuant to ORS 756.580.

APPENDIX O

APPENDIX O

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION

COLUMBIA STEEL CASTING CO., INC., an Oregon corporation,	) Case No. 92C-12005
Plaintiff,	) JUDGMENT AFFIRMING PUBLIC UTILITY COMMISSION OF OREGON ORDER NOS. 92-557 AND 92-1135
v.	
PUBLIC UTILITY COMMISSION OF OREGON,	[Entered February 16, 1993]
Defendant, and	
PORTLAND GENERAL ELECTRIC COMPANY, and PACIFICORP,	
Intervenor-Defendants.	

This case came before this Court pursuant an appeal by Columbia Steel Casting Company ("Columbia Steel"), the plaintiff, of two orders issued by the Public Utility Commission of Oregon ("OPUC"), Order Nos. 92-557 and 92-1135. Plaintiff, appearing through Michael C. Dotten and James L. Buchal of the law firm of Heller, Ehrman, White & McAuliffe, filed a complaint against the OPUC orders on October 6, 1992. The complaint alleges that the orders are unlawful because they violated plaintiff's due process rights, because the OPUC

exceeded its statutory powers, and because the orders were not supported by substantial evidence. Defendant, OPUC, appearing through its counsel, Paul A. Graham, of the Oregon Department of Justice, filed an answer on October 19, 1992 and a motion for summary judgment on October 28, 1992. Portland General Electric Company ("PGE"), appearing through Allan M. Garten of the law firm Tonkon, Torp, Galen, Marmaduke & Booth, intervened as a defendant, filed an answer and a memorandum in support of the OPUC's motion for summary judgment.

The OPUC and PGE, through their motion for summary judgment and supporting memoranda, asked the Court to affirm OPUC Order Nos. 92-557 and 92-1135 in all respects. The OPUC contends that the orders are supported by substantial evidence, are well within the OPUC's statutory powers, and did not violate plaintiff's due process rights. The OPUC's summary judgment motion also argues that no discovery should be permitted by Columbia Steel. PGE's memoranda supported the OPUC. Columbia Steel opposes the OPUC's motion for summary judgment, and argues that this case should proceed to trial.

The Court heard oral argument by the OPUC, PGE, and Columbia Steel on February 3, 1993. Based upon the arguments presented to the Court and the briefs submitted by all the parties on summary judgment, the Court finds that there are no genuine issues of material fact in dispute and that, consistent with the Court's previous rulings, this proceeding is in the nature of appeal and no evidence will be forthcoming. The Court further finds that OPUC Order Nos. 92-557 and 92-1135 are supported by substantial evidence and should be affirmed in all respects. Based upon the findings, it is therefore

ORDERED AND ADJUDGED that JUDGMENT be entered against plaintiff and for defendants, that summary judgment be granted to the OPUC and PGE, and that OPUC Order Nos. 92-557 and 92-1135 are affirmed in all respects.

DATED this 16 day of February, 1993.

/s/_____
RICHARD D. BARBER
CIRCUIT COURT JUDGE

APPENDIX P

APPENDIX P

FILED: December 15, 1993

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

COLUMBIA STEEL CASTING CO., INC.	)	
Appellant,	)	Marion County Circuit Court No. 92C-12005
v.	)	
PUBLIC UTILITY COMMISSION OF OREGON	)	CA A79041
Respondent,	)	
PORTLAND GENERAL ELECTRIC COMPANY,	)	
Intervenor-Respondent	)	
and	)	
PACIFICORP,	)	
Intervenor below.	)	

Date argued or submitted on briefs: November 22, 1993

Before: Rossman, presiding Judge, and De Muniz and Leeson, Judges

Attorney for Apellant: Michael C. Dotten

Attorney for Responding Public Utility Commission:
Jas. Adams, Assistant Attorney General

Attorney for Intervenor-Respondent Portland General Electric Company: Allan M. Garten

AFFIRMED WITHOUT OPINION

APPENDIX Q

APPENDIX Q

IN THE SUPREME COURT OF THE
STATE OF OREGON

COLUMBIA STEEL CASTING CO., INC.	)	
Plaintiff-Appellant, Petitioner on Review	)	Marion County Circuit Court No. 92C-12005
v.	)	ORDER DENYING REVIEW
PUBLIC UTILITY COMMISSION OF OREGON,	)	CA A79041 SC S40990
Defendant-Respondent, Respondent on Review,	)	
PORTLAND GENERAL ELECTRIC COMPANY,	)	
Intervenor-Respondent	)	
and	)	
PACIFICORP,	)	
Intervenor below.	)	

The Court has considered the petition for review and ORDERS that it be denied.

Dated this 22nd day of March, 1994.

/S/
GEORGE A. VAN HOOMISSEN
PRESIDING JUSTICE

Gillette and Graber, JJ., not participating

APPENDIX R

APPENDIX R

Excerpts from Oregon Revised Statutes Chapters 757 and 758.

757.020. Duty of utilities to furnish adequate and safe service at reasonable rates.

Every public utility is required to furnish adequate and safe service, equipment and facilities, and the charges made by any public utility for any service rendered or to be rendered in connection therewith shall be reasonable and just, and every unjust or unreasonable charge for such service is prohibited.

757.325. Undue preferences and prejudices.

(1) No public utility shall make or give undue or unreasonable preference or advantage to any particular person or locality, or shall subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect.

(2) Any public utility violating this section is guilty of unjust discrimination.

757.480. Approval needed prior to disposal, mortgage or encumbrance of operative utility property or consolidation with another public utility.

(1) No public utility doing business in Oregon shall, without first obtaining the commission's approval of such transaction:

(a) Sell, lease, assign or otherwise dispose of the whole of the property of such public utility necessary or useful in the performance of its duties to the public or any part thereof of a value in excess of $10,000, or sell, lease, assign or otherwise dispose of any franchise, permit or right to maintain and operate such public utility or public utility property, or perform any service as a public utility; or

(b) Mortgage or otherwise encumber the whole or any part of the property of such public utility necessary or useful in the performance of its duties to the public, including any franchise, permit or right to maintain and operate such public utility or public utility property, or perform any service as a public utility; or

(c) By any means whatsoever, directly or indirectly, merge or consolidate any of its lines, plant, system or other property whatsoever, or franchise or permit to maintain or operate any public utility property, or perform any service as a public utility, or any part thereof, with any other public utility.

(2) Every such sale, lease, assignment, mortgage, disposition, encumbrance, merger or consolidation made other than in accordance with the order of the commission authorizing the same is void.

(3) This section does not prohibit or invalidate the sale, lease or other disposition by any public utility of property which is not necessary or useful in the performance of its duties to the public.

ALLOCATION OF TERRITORIES AND CUSTOMERS

758.400 Definitions for ORS 758.015 and 758.400 to 758.475. As used in ORS 758.015 and 758.400 to 758.475 unless the context requires otherwise:

(1) "Allocated territory" means an area with boundaries established by a contract between persons furnishing a similar utility service and approved by the commission or established by an order of the commission approving an application for the allocation of territory.

(2) "Person" includes individuals, firms, partnerships, corporations, associations, cooperatives and municipalities, or their agent, lessee, trustee or referee.

(3) "Utility service" means service provided by any equipment, plant or facility for the distribution of electricity to users for the distribution of natural or manufactured gas to consumers through a connected and inter-related distribution

system. "Utility service" does not include service provided through or by the use of any equipment, plant or facilities for the production or transmission of electricity or gas which pass through or over but are not used to provide service in or do not terminate in an area allocated to another person providing a similar utility service.

758.405 Purpose of ORS 758.400 to 758.475. The elimination and future prevention of duplication of utility facilities is a matter of statewide concern; and in order to promote the efficient and economic use and development and the safety of operation of utility services while providing adequate and reasonable service to all territories and customers affected thereby, it is necessary to regulate in the manner provided in ORS 758.400 to 758.475 all persons and entities providing utility services.

758.410 Contracts for allocation of territories and customers between suppliers of utility service and for transfer of facilities. (1) Any person providing a utility service may contract with any other person providing a similar utility service for the purpose of allocating territories and customers between the parties and designating which territories and customers are to be served by which of said contracting parties; and the territories and customers so allocated and designated may include all or any portion of the territories and customers which are being served by either or both of the parties at the time the contract is entered into, or which could be economically served by the then existing facilities of either party, or by reasonable and economic extensions thereto.

(2) Any such contracting parties may also contract in writing for the sale, exchange, transfer, or lease of equipment or facilities located within territory which is the subject of the allocation agreed upon pursuant to subsection (1) of this section. Any sale, exchange, transfer or lease of equipment, plant or facilities made pursuant to this subsection by any person which is a "public utility" as defined in ORS 757.005 is also subject

to the approval of the commission to the extent required by ORS chapter 757.

758.415 Contract enforceable if approved by commission; conditions for approval. Notwithstanding any other provisions of law, a contract entered into pursuant to ORS 758.410, when approved by the commission as provided in ORS 758.420 to 758.475, shall be valid and enforceable; provided, that the commission shall approve such a contract only if the commission finds, after a hearing as provided in ORS 758.420 to 758.475, that the contract will eliminate or avoid unnecessary duplicating facilities, and will promote the efficient and economic use and development and the safety of operation of the utility systems of the parties to the contract, while providing adequate and reasonable service to all territories and customers affected thereby.

758.420 Filing of contract; hearing on approval; notice. (1) A contract entered into pursuant to ORS 758.410 shall be promptly filed with the commission, and the commission shall, within 30 days after such filing, give notice of such filing. If the commission chooses or if any customer or customers request a hearing on the matter within 30 days of the notice, the commission shall hold a hearing by telephone or in person. The commission shall give notice of such hearing within 30 days of the customer's request which notice shall set the date and place of hearing on the question as to whether or not such contract will be approved. The hearing shall be held at a place within or conveniently accessible to the territories affected by the contract.

(2) The commission shall publish notice of the filing in a newspaper or newspapers of general circulation in each of the territories affected by the contract. Each such notice shall be published at least once weekly for two successive weeks.

758.425 Order of commission on contract; suit to vacate order. (1) On the basis of the applicant's filing or, if there is a hearing, on the record made at the hearing held pursuant to ORS 758.420, the commission shall enter an order either approving or disapproving the contract as filed, together with any appropriate findings of the facts supporting such order.

(2) Any party to such contract may commence a suit to vacate and set aside the commission's order on the ground that such order is unlawful, and so far as applicable and not inconsistent herewith, the provisions of ORS 756.580 to 756.610 shall govern such suit.

(3) If the commission approves a contract and no suit is filed to vacate or set aside the commission's order as above provided, the contract shall be deemed to be valid and enforceable for all purposes from the date on which the right to file such suit expires. If a suit to vacate or set aside the commission's order is filed, the validity of the contract shall be as determined by the final judgment therein rendered.

758.430 Amendment of contract; approval of commission. Any contract that has been approved as provided in ORS 758.400 to 758.475 may be subsequently amended by the parties thereto, but any such amendatory agreement shall be filed with the commission and shall thereafter be approved or disapproved by the commission in the manner provided in ORS 758.420 and 758.425. However, no hearing is required if all affected customers approve the amendatory agreement. An amendatory agreement may be enforced in the manner provided in ORS 758.465.

758.435 Application, by person providing exclusive utility service, for allocation of territory; hearing; notice. (1) Any person providing a utility service in a territory that is not served by another person providing a similar utility service may make application to the commission for an order allocating such territory to it. The application may include any adjacent area

that it is more economical and feasible to serve by an extension of the applicant's existing facilities than by an extension of the facilities of another person.

(2) The commission shall within 30 days after the filing of such application give notice of the filing. If the commission chooses, or if a customer requests a hearing on the matter within 30 days of the notice, the commission shall hold a hearing by telephone or in person. The commission shall give notice of the hearing within 30 days of the request which notice shall set the date and place of hearing. The hearing shall be held at a place within or conveniently accessible to the territory covered by the application. Notice of the filing shall be by publication in a newspaper or newspapers of general circulation in the territory covered by the application and shall be published at least once weekly for two successive weeks. Written notice of the filing shall be give to providers of similar utility service in adjacent territory.

(3) Territory within the limits of a city, as fixed on May 31, 1961, shall not be deemed to be served exclusively by any person, if such city is, on such date, served by more than one person having necessary municipal or franchise authority to serve within the entire city.

758.440 Order of commission on application. (1) On the basis of the application, or, if there is a hearing, on the record made at the hearing held pursuant to ORS 758.435, the commission shall enter an order either approving or disapproving the application as filed, or as amended, together with findings of the facts supporting such order.

(2) The commission, before approving an application for the allocation of territory, shall find that the applicant is exclusively serving the territory covered by the application and in the case of an adjacent unserved area that it is more economical and feasible to serve by an extension of the

applicant's existing facilities than by an extension of the facilities of another person.

758.445 Suit to vacate order on application. Any party to the hearing may commence a suit to vacate and set aside the commission's order as provided in ORS 756.580 to 756.610. If no suit is filed to vacate or set aside the commission's order within the specified time, the order shall thereafter be valid and enforceable for the purposes herein specified from the date on which the right to file such suit expires. If a suit to vacate or set aside the commission's order is filed, the validity of the order shall be determined by the final judgment therein provided.

758.450 Contract required for allocation of territory; allocated territory exclusive; activity prohibited during pendency of application; exception; third party financing.

(1) Territory served by more than one person providing similar utility service may only become an allocated territory by a contract approved by the commission.

(2) Except as provided in subsection (4) of this section, no other person shall offer, construct or extend utility service in or into an allocated territory.

(3) Except as provided in subsection (4) of this section, during the pendency of any application for an allocation of exclusively served territory, no person other than applicant shall offer, construct or extend utility service in or into the territory applied for; nor shall any person, without the express consent of the commission, offer, construct or extend utility service in or into any unserved territory which is the subject of a filing pending before the commission under ORS 758.420 or 758.435.

(4) The provisions of ORS 758.400 to 758.475 do not apply to any corporation, company, individual or association of individuals providing heat, light or power:

(a) From any energy resource to fewer than 20 customers, if it began providing service to a customer prior to July 14, 1985;

(b) From any energy resource to fewer than 20 residential customers so long as the corporation, company, individual or association of individuals serves only residential customers;

(c) From solar or wind resources to any number of customers: or

(d) From biogas, waste heat or geothermal resources for nonelectric generation purposes to any number of customers.

(5) Nothing in subsection (4) of this section shall prohibit third party financing of acquisition or development by a utility customer of energy resources to meet the heat, light or power requirements of that customer.

758.455 Investigation by commission respecting contracts or applications; hearing procedure. (1) The commission may make such investigations respecting a contract or an application for the allocation of territory as the commission deems proper including the physical examinations and evaluations of the facilities and systems of the parties to the contract, estimates of their operating costs and revenues and studies of such other information as the commission deems pertinent.

(2) Insofar as applicable and consistent herewith, the provisions of ORS 756.500 to 756.610 shall govern the conduct of hearings.

(3) In considering competing applications to serve the same territory, there shall be a disputable presumption that applicants have an equal ability to extend, improve, enlarge, build, operate and maintain existing or proposed facilities.

758.460 Assignment or transfer of rights acquired by allocation; approval of commission.

(1) The rights acquired by an allocation of territory may only be assigned or transferred with the approval of the commission after a finding that such assignment or transfer is not contrary to the public interest. However, no hearing is required if all affected customers agree to the proposed assignment or transfer.

(2) No approved contract or order approving an allocation of territory shall be construed to confer any property right; providing, however, upon the death of an individual who is a party to an approved contract or the applicant under an approved order, the executor or administrator shall continue the operation thereunder for the purpose of transferring such rights for a period of not to exceed two years from the date of death.

(3) In the event the property of a person serving an allocated territory is condemned, no value shall be claimed or awarded by reason of the contract or order making such allocation.

758.465 Enforcement procedure. In the event a contract approved by the commission is breached or in the event an allocated territory is served by a person not authorized by such contract, or order of the commission, the aggrieved person or the commission may file an action in the circuit court for any county in which is located some or all of the allocated territory allegedly involved in said breach or invasion. The trial of such action shall proceed as in an action not triable by right to a jury. Any party may appeal to the Court of Appeals from the court's decree, as in other equity cases. The remedy provided in this section shall be in addition to any other remedy provided by law.

758.470 Application to cities, municipalities and cooperatives of ORS 758.400 to 758.475.

(1) ORS 758.015 and 758.400 to 758.475 shall not be construed or applied to restrict the powers granted to cities to issue franchises, or to restrict the exercise of the power of condemnation by a municipality; and when a municipality has condemned or otherwise acquired another person's equipment, plant or facilities for rendering utility service, it shall acquire all of the rights of the person whose property is condemned to serve the territory served by the acquired properties.

(2) ORS 758.015 and 758.400 to 758.475 shall not be construed to restrict the right of a municipality to provide utility service for street lights, fire alarm systems, airports, buildings and other municipal installations regardless of their location.

(3) ORS 758.015 and 758.400 to 758.475 shall not be construed to confer upon the commission any regulatory authority over rates, service or financing of cooperatives or municipalities.

758.475 Fees. [Omitted]

APPENDIX S

APPENDIX S

AGREEMENT

THIS AGREEMENT made this 18th day of July, 1972, by and between PACIFIC POWER & LIGHT COMPANY, a Maine Corporation, hereinafter called "Pacific," and PORTLAND GENERAL ELECTRIC COMPANY, an Oregon corporation, hereinafter called "Portland General,"

WITNESSETH:

WHEREAS, Portland General and Pacific each own facilities and provide electric utility service within and around the City of Portland in areas shown on a map marked "Exhibit A: and more particularly described in "Exhibit B," which exhibits are attached hereto and made a part hereof; and

WHEREAS, Pacific provides electric utility service in and around Rainier, Oregon, within an area referred to in tariffs filed with the Public Utility Commissioner of Oregon as Pacific's Rainier District, which area is shown on Exhibit A an described in "Exhibit C," attached hereto and made a part hereof; and

WHEREAS, Portland General and Pacific wish to provide for the elimination of duplicating electric utility facilities in the foregoing areas; and

WHEREAS, the City of Portland, by Ordinance No. 134416, passed April 26, 1972, effective May 26, 1972, consented to the exchange by Portland General and Pacific of certain properties located within the city;

NOW, THEREFORE, in order to implement the elimination of said duplicating facilities and to comply with Ordinance 134416, it is agreed:

1. Exchange of Facilities

(a) Pacific shall transfer and convey to Portland General and Portland General shall acquire from Pacific all of the electric distribution plant, including distribution substations, poles, lines, transformers, meters, related distribution facilities, and all easements necessary for the operation thereof, owned, operated and maintained by Pacific in the area designated as Pacific's Rainier service district, shown on Exhibit A and described in Exhibit C, and in the area designated as Parcel C, shown on Exhibit A and described in Exhibit B; excluding, however (1) facilities owned, operated and maintained by Pacific within an area commonly known as the Portland downtown core area, designated as Parcel D on Exhibit A, and described in Exhibit B, and (2) certain duct lines owned, operated and maintained by Pacific extending from Pacific's Albina substation to Pacific's facilities within the Portland downtown core area. Distribution substations to be conveyed by Pacific to Portland General are listed in "Exhibit D," attached hereto and made a part hereof.

(b) Portland General shall transfer and convey to Pacific and Pacific shall acquire from Portland General all of the electric distribution plant, including distribution substations, poles, lines, transformers, meters, related distribution facilities, and all easements necessary for the operation thereof, owned, operated and maintained by Portland General in the areas designated as Parcels A and B, shown on Exhibit A and described in Exhibit B; excluding, however: (1) facilities describe under the streetlight plant account of the Uniform Systems of Account, except that lease area lights will be conveyed by Portland General to Pacific; (2) certain duct lines owned, operated and maintained by Portland General extending from Portland General to Pacific; (2) certain duct lines owned, operated and maintained by Portland General extending from Portland General's Station L to Portland General's facilities within the Portland downtown core area; and (3) standard wood poles used exclusively for street lighting.

Distribution substations to be conveyed by Portland General to Pacific are listed in Exhibit D.

(c) Portland General shall transfer and convey to Pacific and Pacific shall transfer and convey to Portland General the transmission facilities described in "Exhibit E," attached here and made a part hereof.

(d) As a necessary part of the distribution and transmission substations and facilities exchanged hereunder and described in Exhibits D and E hereto, Portland General and Pacific shall convey to each other the fee interest or easements in the underlying real property on which exchanged facilities are located, including such adjacent property as is needed for the expansion of such substations and facilities; except that with respect to the 115 Kv transmission line extending from Knott Substation to Willamette Meridian to be acquired by Pacific hereunder (Exhibit E, Paragraph 2a), Portland General will retain the right to rebuild, at Portland General's expense, that portion of said line extending from Columbia Substation to Willamette Meridian and shall have joint use with Pacific of the present 50-foot right-of-way on which said line is erected for the purpose of providing an additional circuit; provided that the existing 115 Kv circuit or the equivalent thereof shall continue to be available to Pacific. Real property to be conveyed by Pacific to Portland General is shown on a series of property plats prepared by Pacific, collectively designated as "Exhibit G," attached hereto and made a part hereof. Real property to be conveyed by Portland General to Pacific is shown on a series of property plats prepared by Portland General, collectively designated as "Exhibit H," attached hereto and made a part hereof. Non-operating real property shall not be exchanged. However, Pacific's Rainier service center and a tract of land located in Rainier and presently used by Pacific as a pole yard shall be designated as operating property and conveyed to Portland General hereunder.

(e) After notice to Pacific, Portland General shall at its expense promptly disconnect from Pacific's system and connect to Portland General's system the electric distribution facilities located in Parcel C, shown in Exhibit A and described in Exhibit B, excepting, however, the following substations:

1. Woodstock
2. Holgate
3. Laurelhurst.

The disconnection and reconnection of facilities shall be performed in a manner such as to minimize any interruption of electric service to the customers served by Pacific from its said facilities. For the purposes hereof, the severance of facilities from Pacific's system and the connection of such facilities to Portland General's system shall be known as a cutover.

From the Date of Cutover to the Date of Conveyance, as hereinafter provided, Portland General shall be responsible for any maintenance, repair or replacement necessary to furnish electric service over said facilities.

(f) After notice to Portland General, Pacific shall at its expense promptly disconnect from Portland General's system and connect to Pacific's system the electric distribution facilities located in Parcels A and B, shown in Exhibit A and described in Exhibit B, excepting, however, the Russellville substation. The disconnection and reconnection of facilities shall be performed in a manner such as to minimize any interruption of electric service to the customers served by Portland General from its said facilities. For the purposes hereof, the severance of facilities form Portland General's system and the connection of such facilities to Pacific's system shall be known as a cutover.

From the Date of Cutover to the Date of Conveyance, as hereinafter provided, Pacific shall be responsible for any maintenance, repair or replacement necessary to furnish electric service over said facilities.

(g) The cutover of electric facilities from one system to that of the other party will necessarily take place over a period

of time. It is agreed that the cutover will be correlated so that maintenance of each other's facilities will be substantially equal in duration and extent. Cutover of facilities shall commence on or about July 24, 1972, and be completed on or before the Date of Conveyance. Neither party shall increase the transformer capacity connected to the other party's transmission at Woodstock, Holgate, Laurelhurst and Russellville Substations without the consent of the other party.

(h) Promptly after completion of cutover of all facilities, each party will provide to the other a tabulation by units of property of facilities exchanged, copies of distribution and transmission maps, and records necessary to record the property on the books of account of the receiving party.

(i) If equipment is leased to a customer and such customer transferred to the other party, the lease and payments thereunder shall be assigned to the party receiving the customer.

2. Transmission System Interconnections

Portland General and Pacific will establish on their transmission systems, at voltages of 57 Kv, 69 Kv and 115 Kv, such interconnections as may be necessary to provide for the proper operation and integrity of their respective transmission systems. The transmission system interconnections as are described more specifically in "Exhibit F," attached hereto and made a part hereof. Metering equipment required for such interconnections shall be installed as soon as practicable, and the cost hereof shall be shared equally, notwithstanding which party makes the actual installation. Energy transferred between the systems of each party shall be accounted for in accordance with paragraph 4 (a) hereof.

3. Distribution System Interconnections

(a) Portland General and Pacific shall provide on their respective distribution systems such interconnections as may be

necessary to provide for the proper operation of said systems until completion of all cutovers.

(b) Where necessary, meters shall be installed by and at the expense of the party receiving energy from the system of the other party. Energy transferred shall be accounted for in accordance with paragraph 4 (a) hereof.

(c) Unmetered interconnections shall be made and accounted for in accordance with a certain energy exchange agreement heretofore entered into by the parties hereto, dated December 21, 1971.

(d) It is the intent of this agreement that the number of such distribution system interconnections shall be held to a minimum and that all such interconnections shall be radial.

4. Energy Exchange

(a) Commencing with the date hereof, each party shall maintain a record of the amounts of power and energy delivered to the other party at the points of interconnection made in accordance with paragraphs 3 (a) and 3 (b). Each party will thereafter reimburse the other for amounts of power and energy so delivered and received, with a deduction adjustment of 5 percent for losses in amounts delivered. Amounts of power and energy so delivered and received shall be estimated in accordance with scheduling procedures existing between the parties, and adjustments made from time to time so that the scheduled replacement quantities after deduction for losses shall equal the measured energy delivered to each party at the points of interconnection.

(b) The transmission system interconnections described in paragraph 2 hereof shall be metered and telemetered as mutually agreed to by the parties, and interchanges at such interconnections shall be accounted for hourly as actual

interchange between the parties in accordance with normal existing scheduling procedures.

(c) In order to provide reliability to their customers, Portland General and Pacific shall during emergencies provide unmetered interconnections at points and locations to be determined by the operating department of both parties, the duration thereof to be held to a minimum. Energy transferred during such emergencies shall be accounted for in accordance with paragraph 4 (a) hereof.

5. Maintenance and Repair

Until cutover of facilities as provided herein, each party shall at its expense maintain and repair those facilities which it shall transfer to the other party.

6. Date of Conveyance

Unless required by regulatory authorities or changed by mutual agreement, the Date of Conveyance shall be not later than July 31, 1973. At such time, each party shall execute and deliver to the other a deed and bill of sale for the real and personal property conveyed and transferred in accordance herewith.

7. Transfer of Customer Accounts

The transfer of customer accounts between Portland General and Pacific shall commence on July 24, 1972, and shall be coordinated so that the revenues from the sales of electricity of each company will remain substantially the same over the period required to accomplish transfer of all customers involved. At the time of such transfer, each party shall make available to the other list of the transferred customers, together with accounting, billing service and historical sales records relating thereto. On the date of the transfer of customer accounts, each party will render a final bill to those customers

being transferred to the other party. Accounts receivable will be retained by the party issuing the final bill.

8. Taxes

Real and personal property taxes relating to the facilities conveyed shall be prorated between the parties as of the Date of Conveyance.

9. Mortgage Release

Pacific's said electric facilities are subject to the lien of Pacific's Mortgage and Deed of Trust to Morgan Guaranty Trust Company of New York (formerly Guaranty Trust Company of New York), Corporate Trustee, dated July 1, 1947, as amended and supplemented. Portland General's said electric facilities are subject to a mortgage and Deed of Trust held by the Marine Midland Bank - New York, Trustee, dated July 1, 1945, as amended and supplemented. Promptly after the Date of Conveyance, each party shall obtain and deliver to the other a release of such facilities from the lien of said Mortgages and Deeds of Trust.

10. Damage to Facilities

If for any cause said electric facilities, or any portions thereof, are entirely or substantially destroyed or seriously damaged prior to the Date of Cutover, and the owner thereof does not restore said facilities to substantially their former condition, the parties shall agree upon an equitable adjustment of such destruction or damage. If such destruction or damage to facilities shall be deemed the owner thereof and solely responsible for any restoration of said facilities that it elects to make.

11. Injury to Persons or Damage to Property of Others

Each party shall be liable for injuries to persons or damage to property of third parties arising out of its negligent actions or arising out of its operation and maintenance of facilities owned by the other party and described herein; and, further, the party operating and maintaining the facilities shall defend, indemnify and save harmless the owner hereof from any and all liabilities for damages and expenses, direct or consequential, on account of such personal injury or property damage. In the event such injury or damage is caused by the joint negligence of the parties, then the parties shall share equally the costs of damages and expenses on account of such injury or damages.

12. Employees

Employees of Pacific's Rainier District may at their election transfer to and become employees of Portland General. Compensation and other employee benefits received by these employees from Portland General will be made substantially equal to that being received from Pacific at the time of their transfer.

13. Assignment of Contractual and Other Rights

Portland General shall assign and transfer to Pacific and Pacific shall assign and transfer to Portland General, all contracts, agreements, easements, franchises, leases and any and all rights relating to the construction, maintenance, ownership and operation of the facilities and accounts to be transferred or conveyed thereunder except that no assignment shall be made of Pacific's franchise to operate in Portland.

14. Regulatory Approval

This agreement and the transfer of facilities pursuant thereto are subject to the approval of the Public Utility

Commission of Oregon and any other regulatory agency having jurisdiction over the parties hereto and the transactions herein provided for. Portland General and Pacific shall make such applications as are necessary to obtain the approval of this agreement and the transfer of property provided for herein.

15. Assignment

This agreement may not be assigned except with the prior written consent of the other party.

IN WITNESS WHEREOF, the parties hereto have caused this AGREEMENT to be executed in duplicate on the day and year herein-above first set forth.

PACIFIC POWER & LIGHT COMPANY
By /s/_____
A.C. Bartholomew
Senior Vice President

Attest:
/s/_____
Assistant Secretary

PORTLAND GENERAL ELECTRIC COMPANY

By /s/_____
Hilbert S. Johnson
Senior Vice President

Attest:
/s/_____
Asst. Secretary

Exhibit A Map of Areas Exchanged [omitted]

Exhibit B Boundary Descriptions of Parcels A, B, C and D

Exhibit C Boundary Description of Rainier Service District [omitted]

Exhibit D Distribution Substations to be Exchanged [omitted]

Exhibit E Transmission Facilities to be Exchanged [omitted]

Exhibit F Transmission System Interconnections [omitted]

Exhibit G Real Property Conveyed to Portland General [omitted]

Exhibit H Real Property Conveyed to Pacific [omitted]

EXHIBIT B

Service Areas
of
PORTLAND GENERAL ELECTRIC COMPANY
and
PACIFIC POWER & LIGHT COMPANY
Portland, Oregon

PARCEL A:

Beginning at the point of intersection of the South line of the North Portland Harbor with the centerline of the Pacific Highway . . . [continued metes and bounds description of parcel].

PARCEL B:

Beginning at the point of intersection of the extended centerline of S.W. Jefferson Street with the centerline of Pacific Highway . . . [continued metes and bounds description of parcel].

PARCEL C:

Beginning at a point on the Oregon-Washington State line and an extension of the east side of Sundial Ranch Road, . . . [continued metes and bounds description of parcel].

PARCEL D:

Beginning at a point on the center line of S.W. Market Street at its intersection with the center line of S.W. First Avenue; . . . [continued metes and bounds description of parcel].

APPENDIX T

APPENDIX T

BEFORE THE PUBLIC UTILITY COMMISSIONER

OF OREGON

UF 3074

In the Matter of the Suspension)
of Revised Tariff Schedules)
applicable to electric service in)
the State of Oregon filed by)
PACIFIC POWER & LIGHT)
COMPANY; on the)
Commissioner's own motion.)

[Excerpt of testimony of OPUC staff witness Evan White in the proceeding that led to Order No. 74-658, App. L]

TRANSCRIPT OF PROCEEDINGS
Volume XXIII
June 7, 1974

. . .

[Pacific's predecessor] maintained rates in Portland and Columbia County at a parity with Portland General Electric Company, and Pacific continued this practice after the merger. The Commissioner, in the past, has permitted Pacific to match rates of PGE partly because the two companies at one time competed with each other for customers and had overlapping service areas. Competition between the two utilities and the problem of overlapping service areas has since been resolved through exchanges of service territory, which were approved by the Commissioner. "Competition" can no longer be used to justify lower rates in Area P. [Portland].

APPENDIX U

APPENDIX U

[SEAL OF THE STATE OF OREGON]

DAVE FROHNMAYER
Attorney General

JAMES E. MOUNTAIN, JR.
Deputy Attorney General

DEPARTMENT OF JUSTICE
Justice Building
Salem, Oregon 97310
Telephone: (503) 378-6986
Fax: (503) 378-3784

April 16, 1990

George M. Galloway, Esq.
900 SW Fifth Avenue, Suite 2300
Portland, OR 97204

Leonard Girard
Portland General Electric Company
121 SW Salmon Street, TB-17
Portland, OR 97204

Benjamin Walters
Deputy City Attorney of Portland
1220 SW Fifth Avenue, Room 315
Portland, OR 97204

Gentlemen:

I am sending you some information dealing with the question of whether Pacific Power and Light may serve a customer located in the service territory of Portland General Electric Company.

I have enclosed the following:

1. Memorandum written by John H. Socolofsky to Ivan Gold, formerly Deputy Commissioner for the PUC. With respect to these memos, the members of the Commission have consented to waive the attorney/client privilege;

2. A copy of Order 72-870, which approved the current service arrangement in Portland between Pacific and PGE;

3. A copy of the Ordinance No. 134416 of the City of Portland, which approved the same arrangement; and

4. Copies of legislative history.

Mr. Socolofsky's memo sets forth what is still the Commission's position. The PUC believes that, first, ORS chapter 758 applies to Portland and second, that there has been an allocation of territory such that Pacific cannot offer service to a customer in PGE's territory.

With respect to whether ORS chapter 758 applies to Portland, our office reads ORS 758.435(3) as saying that a utility cannot claim to have exclusively served any territory in cities which franchised two or more utilities if the utility's claim is based on service rendered on or before May 31, 1961. It is nothing more than exception to the general rule in ORS 758.435(1), which allows a utility to ask for allocation of territory which it exclusively serves.

With respect to the question of whether there has been an allocation of territory, we read Order No. 72-870 to have made an allocation. Even though the order purports to be based upon ORS 757.480, the statute dealing with the sale of property, it

contains all the findings necessary to constitute an allocation of service territory within Portland to Pacific and to PGE.

Sincerely,
/s/ Paul A. Graham
Assistant Attorney General
Public Utility Section

PAG:dp:smi/5579G
Enclosures

AUG 5 1997
CLERK

(3)

No. 97-49

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1997

PORTLAND GENERAL ELECTRIC COMPANY,

Petitioner,

v.

COLUMBIA STEEL CASTING CO., INC.

Respondent.

On Petition For Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Michael C. Dotten
Counsel of Record
Eric R. Todderud
HELLER, EHRMAN, WHITE
& McAULIFFE
Suite 1750
200 S.W. Market Street
Portland, OR 97201-5718
(503) 227-7400
Attorneys for Respondent

60 pp

QUESTIONS PRESENTED

Is a monopolist entitled to state action immunity when the state agency that determines on a case-by-case basis whether to permit utility monopolies did not authorize a monopoly for the City of Portland?

Is a monopolist entitled to state action immunity when that monopolist intentionally avoided the statutory process for seeking state authorization of its monopoly?

Is a monopolist entitled to state action immunity based solely on the regulatory oversight of a state administrative agency when that monopolist knew or had reason to know that it lacked a lawful monopoly under state law because it had intentionally modified an agreement that would have clearly applied for such a monopoly?

PARTIES TO THE PROCEEDING

In addition to the parties named in the case caption, the Public Utility Commission of Oregon was a defendant in the U.S. District Court. The Public Utility Commission did not seek rehearing at the Circuit Court and through entrance of an appearance only, the Commission waived its right to file a brief before this Court.

On July 1, 1997, Portland General Corporation (parent of the defendant Portland General Electric Company) merged, through an exchange of stock, with Enron Corporation. Enron Corporation is the surviving corporation, and hence the new parent corporation of defendant Portland General Electric Company.

Respondent Columbia Steel Casting Co., Inc. is privately owned and has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

STATEMENT OF THE CASE 1

A. Oregon Law Permits Only One Way For PGE And PP&L To Create Exclusive Service Territories 2

B. The City Opposed Exclusive Service Territories 3

C. In 1972, PGE And PP&L Agreed To An Exchange Of Facilities In Portland After The City Refused To Consent To Exclusive Service Territories 4

D. The Utilities Applied To The OPUC For (1) An Agreement To Exchange Facilities In Portland (Pursuant To ORS Chapter 757), Not A Territorial Allocation; and (2) A Transfer Of Territorial Allocations In Rainier, Oregon (Pursuant To ORS Chapter 758). 5

E. The OPUC Approved An Exchange Of Facilities, Not A Territorial Allocation In Portland 6

F. PP&L And The OPUC Did Not Believe That There Were Exclusive Service Territories In Portland 8

G. Even Into The 1990s, Both Utilities Doubted The Lawfulness Of Their Monopoly Service Territories 10

H. PGE Misrepresents Its Motivation For Settling With PP&L 11

REASONS FOR DENYING THE WRIT 12

I. The Rulings Below Were Neither Novel Nor Inconsistent With Supreme Court Rulings 12

A. The 1972 Order Did Not Sanction Anticompetitive Conduct 12

B. This Is Not A Question Of Active Supervision 15

C. OPUC's Post-1972 Actions Do Not Insulate PGE 16

D. The Lower Courts Did Not Violate Principles Of Full Faith and Credit 18

E. No Conflict Among The Circuits Exists . . 20

F. The Issues In This Case Arise Infrequently 22

G. The Result Is Fair 23

CONCLUSION 24

APPENDIX A-1

TABLE OF AUTHORITIES

Page

CASES

California Retail Liquor Dealers Ass'n
v. Midcal Aluminum, Inc.
445 U.S. 97, 100 S.Ct. 937 (1980) 12, 15-17

City of Columbia v. Omni Outdoor
Advertising, Inc.,
499 U.S. 365, 111 S.Ct. 1344 (1991) 13, 16, 17

Columbia Steel Casting Co., Inc. v. Portland
General Electric Co.,
111 F.3d 1427 (9th Cir. 1997) 2

Federal Trade Comm'n v. Ticor Title Ins. Co.,
504 U.S. 621, 112 S.Ct. 2169 (1992) 14-18

Goldfarb v. Virginia,
421 U.S.773, 95 S.Ct. 2004 (1975) 16

Lease Lights, Inc. v. Public Service
Company of Oklahoma,
849 F.2d 1330 (10th Cir. 1988) 21

Otter Tail Power Co. v. United States,
410 U.S. 366, 93 S.Ct. 1022 (1973) 18

Parker v. Brown,
317 U.S. 341, 63 S.Ct. 307 (1943) 18, 19

Patrick v. Burget,
486 U.S. 94, 108 S.Ct. 1658 (1988) 12

Praxair, Inc. v. Florida Power & Light Co.,
64 F.3d 609 (11th Cir. 1995), *cert. denied*,
__U.S.__, 116 S.Ct. 1678 (1996) 20, 21

Southern Motor Carriers Rate
Conference, Inc. v. United States,
471 U.S. 48, 105 S.Ct. 1721 (1985) 14-17

Town of Hallie v. City of Eau Claire,
471 U.S. 34, 105 S.Ct. 1713 (1985) 18, 19

STATUTES

Or. Admin. R. 860-25-010 12

Or. Rev. Stat. [ORS] 757.480(1) 3

ORS 758.400 3

ORS 758.405 3

ORS 758.410 12

ORS 758.410(1) 2

ORS 758.420 2

ORS 758.425(1) 2, 13

ORS 758.435 3

ORS 758.440 3

ORS 758.440(1) 13

ORS 758.450(1) 3

ORS Chapter 757 . . . . . 3, 5, 6

ORS Chapter 758 . . . . . 2, 3, 5, 6, 18

RULES

Fed. R. Civ. P. 38(d) 23

OTHER

Benjamin J. Holden, *Electric-Deregulation Machine Picks Up Steam,* Wall St. J., July 14, 1997, at B4 22

P. Areeda & D. Turner, I *Antitrust Law* ¶ 214e (1978) 14

STATEMENT OF THE CASE[1]

Petitioner Portland General Electric Company's (PGE) arguments depend on the unique facts of this case, but the facts do not support PGE's cause. Oregon's territorial allocation statute establishes the sole process by which the Oregon Public Utility Commission (OPUC) may approve the allocation of exclusive utility service territories. The OPUC's 1972 Order at issue in this case never gave such approval to PGE because, as PGE admits, PGE and Pacific Power & Light Co. (PP&L) agreed with the Portland City Council to eliminate the notion of exclusive service territories from their Facilities Exchange Agreement (the Agreement). PGE asserts that the OPUC and the parties believed, as early as 1974, that exclusive service territories had been allocated. Even if, under this Court's precedent, those subjective beliefs were relevant, it simply is not true that PGE, PP&L and the OPUC believed exclusive territories had been granted. In other words, the conclusions reached through application of the objective standard by the courts below correspond perfectly with evidence of PGE's and the OPUC's subjective beliefs.

The courts have recognized two narrow exceptions to the normal rule that a state's intent to permit monopolization must be "clearly articulated and affirmatively expressed." One is where the state, through clear articulation, but imperfect execution, fails lawfully to establish the monopoly. The second is where the monopolist innocently relies upon the state's expression of the right to monopolize. PGE's ardent efforts to squeeze its facts into the exceptions are unavailing. On the unique facts of this case, neither exception applies to PGE.

PGE's position depends on its rendition of the facts. It is thus important for the Court to separate the facts of record from PGE's characterizations and *post hoc* rationalizations.

---

[1] Respondent Columbia Steel Casting Co., Inc. (Columbia Steel) cannot accept PGE's statement of the case.

PGE also asks this Court to ignore Oregon law governing utility monopolies. An understanding of that law is crucial for the Court not to be misled.

A. Oregon Law Permits Only One Way For PGE And PP&L To Create Exclusive Service Territories.

PGE starts from this incorrect premise: ". . . the Court of Appeals and all the parties agree that the Oregon statute . . . clearly articulated and affirmatively expressed a state policy to displace competition" with regulation. Pet. at 16.[2] Columbia Steel does not agree, nor did the Court of Appeals agree. That Court noted, "the state's clearly articulated policy is to have the OPUC decide whether to sanction anticompetitive conduct." Columbia Steel Casting Co., Inc. v. Portland General Electric Co., 111 F.3d 1427, 1437 n.8. (9th Cir. 1997), PGE App. A-15.

The Circuit Court's description of Oregon law is accurate. Oregon Revised Statutes (ORS) Chapter 758 establishes a detailed procedure for securing an allocation of an exclusive service territory from the OPUC. Utilities may, but are not required to, enter into a contract "for the purpose of allocating territories and customers between the parties" and designating which utility has the exclusive right to serve which customers. ORS 758.410(1), PGE App. R-3. The contracting utilities must then promptly file the contract with the OPUC. ORS 758.420, PGE App. R-4. The OPUC may then approve or disapprove the contract as filed. ORS 758.425(1), PGE

---

[2] Citations to documents appearing in the appendix submitted by PGE are abbreviated as "PGE App." Documents in Columbia Steel's appendix are cited as "CS App." For documents that are not included in an appendix, Columbia Steel cites to the appropriate numerical designation of that document in the U.S. District Court Clerk's Record (CR __). References to PGE's Petition for Certiorari are abbreviated as "Pet." with a citation to the appropriate page number.

App. R-5. The statute expressly states that an area "may only become an allocated territory" thorough this procedure.[3] ORS 758.450(1), PGE App. R-7.

In contrast, a separate chapter, ORS Chapter 757, requires utilities that sell or exchange facilities to obtain OPUC approval. ORS 757.480(1), PGE App. R-1. Chapter 757, expressly invoked by PGE in its OPUC application, grants no authority to create exclusive service territories.

Thus, there is *no* policy embodied in state statutes that pre-ordains the elimination of competition throughout the state. The statutory scheme *permits* utilities to apply under ORS Chapter 758 for exclusive territorial allocations *subject to* the OPUC's consideration, on a case-by-case basis, whether to permit exclusive service territories.[4] It is against this statutory yardstick that the actions of PGE must be measured.

B. The City Opposed Exclusive Service Territories.

Since 1961, when territorial allocation statutes were proposed in the Oregon legislature, the City of Portland (the City) had opposed the creation of exclusive service territories within Portland. The City Charter prohibited exclusive franchises, CR 72 Ex. W p.1, and the City's franchise to PP&L, PGE's only competitor in Portland, required competition

---

[3] If a utility is the exclusive service provider in an area, then a different procedure applies. See ORS 758.435, 758.440 (PGE App. at R-5 through R-7). That procedure is not implicated in this case.

[4] The statement of legislative policy in ORS 758.405 underscores this point. It is the stated policy of the territorial allocation statutes to eliminate duplication of facilities. ORS 758.405 (PGE App. R-3). To accomplish that policy, the legislature declares that it is necessary to regulate in the manner set forth in ORS 758.400 *et seq.* -- that is, to permit the creation of exclusive service territories if the OPUC consents. Had the legislature intended to eliminate all competition, it would have said so.

throughout the City. CR 269 Ex. 95 pp. 2-3 ("The Grantee shall not . . . enter into any agreement in restriction of competition . . . .").

Prior to 1972, PGE and PP&L had tried to create exclusive service territories within the City. E.g., CR 269 Ex. 22, 35. Each time the City objected,[5] and PGE and PP&L abandoned their efforts.

C. In 1972, PGE And PP&L Agreed To An Exchange Of Facilities In Portland After The City Refused To Consent To Exclusive Service Territories.

In 1972, PGE and PP&L agreed to an exchange of electric facilities in Portland. Initially, they also apparently planned to obtain exclusive service territories to correspond to the facilities that were being exchanged. Prior to seeking approval of their Agreement from the OPUC, PGE and PP&L needed approval of the Portland City Council. They requested an ordinance acknowledging that they would establish areas to "be served exclusively" by the utilities. CR 269 Ex. 47 p.2. PGE concedes that, based on the City's longstanding opposition to monopoly utility service within the City and at the City Attorney's request, the utilities intentionally removed the word "exclusive" from their Agreement.[6] CR 269 Ex. 4 pp. 7-8 and Pet. at 4. With that change, the Portland City Council

---

[5] See, e.g., CR 269 Ex. 26 (City's brief before OPUC relating to 1962 application by PGE). In 1965, the City consented to the limited creation of exclusive service territories in the core area of downtown Portland (miles from the location at issue in this case) in order to facilitate the underground installation of facilities. CR 269 Ex. 31 p. 2. The ordinance expressly consented to the creation of exclusive service territories in those unusual circumstances. Id.

[6] At all relevant times, Section 10-206 of the Portland City Charter provided "[n]o exclusive franchise shall be granted." CR 72 Ex W p.1.

approved the utilities' Agreement that provided for "the sale, transfer and exchange of plant and property" with the proviso: "both companies operate under non-exclusive franchises and . . . the obligation to supply properties within the City must remain binding upon both companies." CR 72 Ex. J p.1.

The parties agree on these facts. See Pet. at 4.

PGE and PP&L then filed their 1972 Agreement (with the words "be served exclusively" omitted) with the OPUC for approval. The application covered two separate matters.

D. The Utilities Applied To The OPUC For (1) An Agreement To Exchange Facilities In Portland (Pursuant To ORS Chapter 757), Not A Territorial Allocation; and (2) A Transfer Of Territorial Allocations In Rainier, Oregon (Pursuant To ORS Chapter 758).

Consistent with the words of the Agreement (as modified to obtain the City's necessary approval), the application sought approval of "the exchange of electric utility facilities in Multnomah County[7] . . ." and the "assignment to [PGE] of certain service territory in Columbia County,[8] Oregon previously allocated to [PP&L]." CS App. A-1 (Caption).

The application cited ORS Chapter 757 for authority to approve the exchange of facilities (CS App. A-1) and ORS Chapter 758 as authority for the transfer of a territorial allocation in Rainier, Oregon. CS App. A-11 ("Assignment of

---

[7] The portions of Portland implicated in the ordinance are located entirely within Multnomah County, Oregon.

[8] Columbia County and the City of Rainier, Oregon are located roughly 60 miles northwest of Portland.

Service Territory"). While ORS Chapter 757 does indeed authorize transfers of utility property (PGE App. R-1) the authority to allocate exclusive service territory is confined to ORS Chapter 758, PGE App. R-2 to R-10.

E. The OPUC Approved An Exchange Of Facilities, Not A Territorial Allocation In Portland.

The OPUC's 1972 Order approving the Agreement is unambiguous. Consistent with the parties Agreement and the application, the 1972 Order approved the "application of [PP&L] to transfer certain of its exclusively served area allocated to it and lying in and around Rainier, Oregon . . . ." PGE App. J-9. The Order also permitted the transfer of utility assets within Portland from one utility to the other. PGE App. J-9, J-10. Yet the Order did not mention exclusive service territories for Portland--an omission that the Circuit Court found to be "glaring." PGE App. A-15. As the Circuit Court observed:

> Columbia Steel argues that PGE and PP&L intentionally introduced ambiguity into the 1972 Agreement in order to slip a monopolistic agreement past the city of Portland. We need not address this argument because, whether or not ambiguity was introduced into the contract for the self-serving purpose of making it less politically vulnerable, the utilities' failure to include the "exclusively served" language in the 1972 Agreement that had been included in the plan submitted to the city Council certainly had the *effect* of creating ambiguity in the 1972 Order.

PGE App. A-17, n. 11.

The transfer of customer accounts authorized under the 1972 Order was not an allocation of exclusive service territory, as PGE would have this Court believe. Once the ownership of

distribution facilities was transferred, the accounts of the customers connected to those facilities had to be transferred as well. But that transfer did not create an exclusive and perpetual right to serve those customers.

This distinction is important because the exchange of facilities was limited. Although PP&L and PGE exchanged many lines, poles and substations, PP&L retained ownership of its transmission line running through Columbia Steel's property, while PGE owned the distribution lines that served Columbia Steel. As a practical and legal matter, the exchange of facilities did not create in PGE the perpetual right to serve Columbia Steel (or any other customer).

It may not be assumed that the OPUC contemplated exclusive service territories by stating that the utilities' employees did not have a right to demand service from their respective employers, as PGE argues. The OPUC concluded that allowing only the utility employees to continue taking service from their employers would have been discrimination. PGE App. J-8. Discrimination is unlawful. PGE App. R-1. Had exclusive service territories been created, the OPUC presumably would not have invoked the proscriptions against unlawful discrimination in its 1972 Order.

Recognizing that the 1972 Order did not clearly sanction anticompetitive conduct, PGE contends that everyone understood that an exclusive service territory had been created. Pet. at 5-7. That understanding, according to PGE, is sufficient to confer antitrust immunity. While Columbia Steel disagrees with PGE's legal argument, PGE is demonstrably wrong on the facts. The District Court's record demonstrates that the regulators and the utilities themselves doubted the existence of a lawful exclusive service territory.

F. PP&L And The OPUC Did Not Believe That There Were Exclusive Service Territories In Portland.

A 1974 rate case involving PGE's co-conspirator, PP&L, raised the issue of competition in Portland. Charles Davenport, former vice president of PP&L, testified that he did not believe exclusive service territories existed in Portland: "I am unaware of a restriction on either utility that they cannot serve anywhere within the City they may choose to extend their facilities to." CR 269 Ex. 16 p.3. The OPUC shared his view.

PGE would excuse its monopolization as innocent and faithful compliance with the will of the OPUC. Again, PGE's argument mischaracterizes the actions of the OPUC. PGE offers isolated statements in OPUC orders from 1973 and 1974 to foster the misimpression that, for 20 years, the agency treated the two utilities as if they had been allocated lawful exclusive service territories. For example, Order 74-658 (PGE App. L), states that competition has been eliminated in Portland. That is correct; the utilities' conspiracy to divide markets had been successful. The order does not say, however, that perpetual and exclusive service territories had been allocated under Oregon law.

In fact, the OPUC held the opposite view. The OPUC staff filed a brief in the 1974 rate case stating that competition within the City was unlikely "[a]s an economic matter and as a practical matter. . . ." CR 269 Ex. 97 p.2. That assertion would make no sense unless the OPUC understood that Portland did not have exclusive service territories. Indeed, in the appeal of the rate case order, the OPUC urged that the OPUC Commissioner *could* limit service territories in Portland, implying that he had not yet done so. CR 269 Ex. 98 p. 3.

Richard Sabin, who signed both orders mentioned above, offered reliable perspective on the territorial allocation issue. He was the attorney for the OPUC in 1972, when the

Agreement was considered and the 1972 Order was issued. CR 266 Ex. 43 p.1. He later became Commissioner and held that post in 1974 during PP&L's rate case. Id. at 2. His affidavit was unequivocal: ". . . Order No. 72-870 was not intended to, and did not, constitute an allocation of service territory pursuant to the Oregon territorial allocation laws." Id. at 3. As to the 1974 rate case order, Commissioner Sabin testified, that order "was not intended to constitute an allocation of service territory pursuant to the territorial allocation statutes." Id. Order 73-688, also signed by Commissioner Sabin, does not even address whether PGE had a state-approved exclusive territorial allocation in Portland. PGE App. K.

Contrary to PGE's assertions, the OPUC did not insist that it had allocated exclusive service territories in Portland until a 1992 Order that came long after the causes of action in this case arose. Even that Order admits that "[n]either the utilities' [1972] Agreement nor the Commission's [1972] order mentions exclusive territories for the Portland exchange." PGE App. M-7. The 1990 letter reprinted at PGE App. U does not alter that conclusion. PGE claims that it refused to serve Columbia Steel "*following* this guidance from the state of Oregon" in the 1990 letter. Mr. Graham, the author of that letter, was not an OPUC Commissioner; he was one of its attorneys. He could not speak definitively for the state, nor announce state policy.

Moreover, PGE has misstated the sequence of the letter in relation to its assertion of the right to monopolize. The letter was issued April 16, 1990, *after* the two utilities had already refused to permit Columbia Steel to take service from PP&L. See CR 269 Ex. 80 (January 8, 1990 file memorandum from Steve Scott, account executive for PGE, noting PGE's refusal of Columbia Steel's request to take service from another utility); CR 269 Ex. 88 pp. 2-7, Ex. 89, Ex. 92 pp. 4-5 (Columbia Steel requested service from PP&L in 1987, PP&L contacted PGE about the request, and PP&L ultimately refused the request

based on the assertion that service territories had been allocated).

For 20 years, PGE and PP&L monopolized the energy market in Portland, knowing that they had altered their Agreement to remove the notion of exclusivity. Once exposed, PGE scrambled to offer *post hoc* rationalizations. But even the conspirators' own conduct belies PGE's claim that the monopolization was part of state policy.

G. Even Into The 1990s, Both Utilities Doubted The Lawfulness Of Their Monopoly Service Territories.

When Columbia Steel requested service from PP&L for the second time in late 1989, PP&L determined that it could no longer continue in the conspiracy to monopolize Portland. PP&L's Executive Vice-President (and later President) feared criminal antitrust liability. He told a PGE executive that if he refused to offer to serve Columbia Steel, "he needed to pick out the wallpaper for his cell." CR 269 Ex. 65 p.9. Clearly, as late as 1990, PP&L did not share PGE's purported universal belief that the two utilities were barred from competing.

In addition, PGE's own conduct undercuts its claim that it could not compete or transfer customers without prior OPUC approval. On May 2, 1991, PGE and PP&L entered into a settlement agreement. CR 269 Ex. 90. The Agreement provided that PP&L would begin furnishing service to Columbia Steel, and PGE would wheel PP&L power to Columbia Steel until PP&L could construct its own distribution facilities to serve Columbia Steel. Id. PGE began wheeling power to Columbia Steel in July 1991. PGE and PP&L did not even apply for permission to transfer the customer until October 2, 1991. PGE App. M-3. The two utilities did not secure OPUC approval for PP&L to serve Columbia Steel until April 1992. PGE App. M-29 to M-30.

PGE contends that the OPUC absolutely prohibited the two utilities from transferring customers from one utility to the other, yet the utilities transferred Columbia Steel without even asking for the OPUC's permission. Had PGE genuinely believed that allowing customers to switch utilities would violate exclusive territorial allocations or draw the wrath of OPUC, it would not have arranged for PP&L to serve Columbia Steel without prior OPUC approval.

H. PGE Misrepresents Its Motivation For Settling With PP&L.

PGE states that it entered into the settlement agreement because it "understood by then the direction in which the District Court was headed. . . ." Pet. at 10 n. 8. Again, PGE's *post hoc* rationalization materially misstates the sequence of events.

PGE and PP&L entered into the settlement agreement on May 2, 1991. CR 269 Ex. 90. On May 31, 1991, the District Court heard oral argument on the applicability of state action immunity. It did not issue its ruling on that issue until July 3, 1991. PGE App. E. Prior to July 3, 1991, the District Court had not ruled on any issue going to PGE's defenses. PGE could not have had any inkling of the "direction of the court" when it entered the settlement. The more plausible explanation is that PGE knew it did not have a lawful service territory allocation, and it wanted to stem the accrual of damages without admitting that it was breaking the law.

Finally, in October 1991, PGE and PP&L *reapplied* for exclusive service territories in Portland, this time under the appropriate statute, and expressly stating their intentions. In its order, the OPUC authorized the creation of the exclusive service territories by citing the appropriate statutes and using the

clear words "exclusive territorial allocation."[9] Columbia Steel does not dispute that since the 1992 Order, PGE and PP&L have had exclusive service territories in Portland.

REASONS FOR DENYING THE WRIT

I. The Rulings Below Were Neither Novel Nor Inconsistent With Supreme Court Rulings

A. The 1972 Order Did Not Sanction Anticompetitive Conduct

State action immunity requires that a monopolist's conduct be part of a clearly articulated and affirmatively expressed state policy to displace competition with regulation. California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 100 S.Ct. 937 (1980) (Midcal). Whether particular anticompetitive acts are "truly the product of state regulation" is the central focus of the test. Patrick v. Burget, 486 U.S. 94, 100, 108 S.Ct. 1658, 1662 (1988).

---

[9] In contrast to the 1972 Order, the 1992 Order reads:

> To resolve any future ambiguity about the status of territorial allocations in Portland, the commission will include in this order a decision on the merits of the joint PGE/PP&L 1991 application in UA 41. The requirements of ORS 758.410 and [Or. Admin. R.] 860-25-010 have been satisfied and the Commission approves PGE's and PP&L's 1991 contract for allocation of territories and customers in Portland.

PGE App. at M-29.

"The exclusive territorial allocation to the area described as Parcel C of Appendix A to this order is confirmed to PGE."

Id. at M-32.

The Oregon legislature has decided that utilities may monopolize only if: (1) they enter into an Agreement providing for monopolization; and then (2) only if the OPUC issues an order permitting monopolization. The utilities intentionally modified their Agreement to avoid asking for an exclusive service territory. Pet. at 4. The Commission could only approve that for which the utilities had applied.[10] Consequently, and not surprisingly, the OPUC Order did not grant exclusive territories and the state action inquiry should end there. PGE asks this Court to ignore whether the state actually sanctioned its monopoly and, in the process, rewrite the state laws that establish a single means for allocating service territories.

PGE complains that analyzing the agency's order, in effect, grafts a second requirement onto the first leg of the test for state action immunity. Pet. at 17. To the contrary, the state statute is not self-effectuating. It is the statute (and not the Circuit Court) that imposes the requirement to analyze the OPUC Order. State law requires the OPUC expressly to decide whether to permit exclusive service territories. ORS 758.425(1), PGE App. R-5. To determine whether PGE's anticompetitive conduct is the product of state regulation, the trial court examined whether the OPUC authorized exclusive service territories. That authorization must come through an order of the OPUC. ORS 758.425(1), PGE App. R-5.

The lower courts properly insisted on clear and affirmative authorization in the 1972 OPUC Order. Any other rule would require "the sort of deconstruction of the governmental process and probing of official 'intent' that [this Court has] consistently sought to avoid." City of Columbia v.

---

[10] ". . . [t]he commission shall enter an order either approving or disapproving the application as filed, or as amended. . . ." ORS 758.440(1); PGE App. R-6.

Omni Outdoor Advertising, Inc., 499 U.S. 365, 377, 111 S.Ct. 1344, 1352 (1991) (Omni).[11]

Contrary to PGE's arguments, the lower courts' analysis is consistent with the decisions in Federal Trade Comm'n v. Ticor Title Ins. Co., 504 U.S. 621, 112 S.Ct. 2169 (1992) (Ticor), and Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 105 S.Ct. 1721 (1985) (Southern). In those cases, inquiries into the meaning of administrative orders were unnecessary because there was no doubt that the private conduct at issue was authorized.

The challenged restraint in both Ticor and Southern was collective pricing by private actors. State statutes, rather than administrative agencies, expressly or impliedly authorized the collective pricing. Ticor, 504 U.S. at 629, 112 S.Ct. at 2174; Southern, 471 U.S. at 63, 105 S.Ct. at 1730. There was no doubt that the rates that were the product of collective

---

[11] Professors Areeda and Turner agree that the clear articulation requirement should apply whenever the state acts through its administrative agencies.

> [T]he determination of both the meaning of state approval and the extent of state authorization must be subject to a clear statement requirement. Adoption of a policy requiring a state to make a clear statement of its intention to supplant competition reconciles the interests of the states in adopting non-competitive policies with the strong national policy favoring competition, and is consistent with the canon of federal statutory construction that exemptions to the antitrust laws are not to be lightly inferred. Where there is no other indication of the proper scope of an officer's authority or the meaning of state approval, a clear statement requirement is the best approach, because it ensures that the strong federal policy embodied in the antitrust laws will not be set aside where not intended by the state, and yet also guarantees that the state will not be prevented by the antitrust laws alone from supplanting those laws as long as it makes its purpose clear.

P. Areeda & D. Turner, I Antitrust Law ¶ 214e, at 91-92 (1978) (footnote omitted).

ratemaking had been approved by the state officials charged with approving those rates. Ticor, 504 U.S. at 629-30, 112 S.Ct. 2174-75; Southern 471 U.S. at 50-51, 105 S.Ct. at 1723. Indeed, the plaintiff in Ticor had conceded that the first leg of Midcal was satisfied, and the only issue was the adequacy of the regulatory scrutiny of the rates. Ticor 504 U.S. at 631-32, 112 S.Ct. at 2175-76.[12]

This case does not present factual circumstances such as those addressed in Ticor or Southern. The OPUC had authority to approve anticompetitive conduct (on a proper application). The question here is whether, in fact, the agency authorized that conduct; that is, "if the displacement [of competition] is both intended by the State and implemented in its specific details." Ticor, 504 U.S. at 633, 112 S.Ct. at 2176. The 1972 Order had to "clearly articulate and affirmatively express" the intent to displace competition but it fell well short of that standard.

B. This Is Not A Question Of Active Supervision

PGE claims that an examination of the OPUC's actions is part of "active supervision" and cannot be considered as part of the first leg of the Midcal test. PGE's view of the Oregon statute is completely at odds with this Court's prior insistence on a clear and affirmative (not passive) sanctioning of anticompetitive behavior.

PGE never advanced its active supervision argument based on Ticor in the District Court or in its initial briefs on the merits in the Circuit Court. PGE raised this argument for the first time on rehearing, after the Circuit Court had ruled that Columbia Steel could not pursue arguments based on the

---

[12] PGE misstates the circumstances in Ticor when it asserts, "the uniform rates that the insurers had agreed upon had not been sufficiently authorized by the responsible state agencies. . . ." Pet. at 17. The problem in Ticor was the level of scrutiny of the rates; there was no question that the appropriate state actors had approved the rates.

absence of active supervision. See PGE App. C-18. PGE may not fairly claim for the first time on appeal that scrutiny of the order is more properly a part of the active supervision leg, but that Columbia Steel is precluded from arguing the absence of active supervision.

Moreover, PGE is simply wrong. As noted above, the question in Ticor was whether the states required and exercised sufficient scrutiny of insurance rates, not whether the regulators had approved the rates. Moreover, Ticor states that both legs of the Midcal test are to ensure that *particular* anticompetitive acts are part of a deliberate and intended state policy. 504 U.S. at 636, 112 S.Ct. at 2178. Unless approval of anticompetitive conduct by an administrative agency was affirmative and clear,[13] it cannot be the basis of antitrust immunity. That is the principle distilled from this Court's precedents, and it is the rule that the lower courts in this case followed.

C. OPUC's Post-1972 Actions Do Not Insulate PGE

This Court has frequently expressed its reluctance to explore intent of state officials. E.g., Omni, 499 U.S. at 377, 111 S.Ct. at 1352. The position that PGE advocates invites and requires the Court to do just that. As demonstrated below, such an exercise would be fruitless for PGE.

Conceding that the 1972 order might not satisfy the first leg of the Midcal test, PGE argues that subsequent conduct of the OPUC demonstrates (1) that the OPUC intended to create an exclusive service territory in 1972; and (2) the OPUC

---

[13] Of course, the agency cannot issue such approval acting alone. It must do so pursuant to a clearly articulated and affirmatively expressed state policy to sanction anticompetitive conduct. See Southern Motor Carriers Rate Conference v. United States, 471 U.S. 48, 62-63, 105 S.Ct. 1721, 1729-30; Goldfarb v. Virginia, 421 U.S. 773, 790, 95 S.Ct. 2004, 2014 (1975).

prohibited competition after 1972. Both assertions are refuted by the facts of record recounted at pages 3 through 12 above.

When state legislatures delegate broad authority to regulate, particular anticompetitive acts dictated or permitted by regulators will be immune from antitrust liability, notwithstanding the absence of express statutory authorization. E.g., Omni, 499 U.S. at 372-73, 111 S.Ct. at 1350; Southern, 471 U.S. at 64-65, 105 S.Ct. at 1731. That is not the case here. Unlike the situation in Omni and Southern, PGE's liability was not premised upon the state's "failure to describe the implementation of its policy in detail". Southern 471 U.S. at 65, 105 S.Ct. at 1731. The State of Oregon enacted a single procedure for implementing its policy by establishing a specific step by step process for creating exclusive service territories. PGE's liability is premised on its intentional failure to follow the State's clear procedure

Basing antitrust immunity on the OPUC's alleged acquiescence in monopolistic conduct would effectively rewrite Oregon law. This is precisely the result Ticor portended and rejected. In speaking of the consequences of displacing competition with regulation, the Court explained,

> States must accept political responsibility for actions they intend to undertake. It is quite a different matter, however, for federal law to compel a result that the States do not intend but for which they are held to account . . . . For states which do choose to displace the free market with regulation, our insistence on real compliance with both parts of the Midcal test will serve to make clear that the State is responsible for the price fixing it has sanctioned and undertaken to control.

Ticor, 504 U.S. at 636, 112 S.Ct. at 2178.

The Oregon legislature determined that the OPUC must announce its intent to displace competition through an order issued under ORS Chapter 758. Permitting subsequent active supervision alone to supplant a clear authorization of anticompetitive conduct would effectively expand the circumstances under which state law permits territorial allocations. As this Court has observed, "[a]ctivities which come under the jurisdiction of a regulatory authority nevertheless may be subject to scrutiny under the antitrust laws." Otter Tail Power Co. v. United States, 410 U.S. 366, 372, 93 S.Ct. 1022, 1027 (1973). The state action doctrine cannot be applied in a manner that substitutes mere active supervision for the requirement of a clear articulation of the state's intent to permit monopolization. Moreover, a state agency cannot, through acquiescence, validate otherwise unlawful conduct.

D. The Lower Courts Did Not Violate Principles Of Full Faith and Credit

A state may not immunize past anticompetitive conduct simply by declaring it to be lawful. Ticor, 504 U.S. at 633, 112 S.Ct. at 2176 ("a State may not confer antitrust immunity on private persons by fiat . . . ."); Town of Hallie v. City of Eau Claire, 471 U.S. 34, 39, 105 S.Ct. 1713, 1716 (1985) (Hallie) ("the State may not validate a [monopolist's] anticompetitive conduct simply by declaring it to be lawful"); Parker v. Brown, 317 U.S. 341, 351, 63 S.Ct. 307, 314 (1943) (Parker) (a state may not "give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful."). Concluding that the Oregon court's cursory review substitutes for prior clear articulation, as PGE requests, would jettison this fundamental rule from antitrust jurisprudence.

In 1992, the OPUC attempted to create an exclusive service territory for PGE and PP&L retroactive to 1972 by issuing a *nunc pro tunc* order declaring what the 1972

Commissioner had intended. PGE App. N. Over Columbia Steel's objection, the OPUC declared that intent without holding an evidentiary hearing or even considering the overwhelming evidence to the contrary (such as the testimony of Mr. Sabin discussed at pages 8-9, supra). An Oregon trial court ruled, without any evidentiary hearing, that there was "substantial evidence" to support the OPUC's Order. PGE App. O. The trial court was affirmed without opinion. PGE App. P.

PGE claims that the federal courts must now be compelled to forego antitrust scrutiny on the basis of the doctrine of "full faith and credit." PGE bases its assertion on the state court's orders which facially do not deal with the antitrust issues in contention in the Federal Courts. The OPUC's declaration as to the intent of a 20-year old order is not a state sanction of anticompetitive conduct. Instead, it is an attempt to "validate a [monopolist's] anticompetitive conduct simply by declaring it to be lawful." Hallie, 471 U.S. at 39, 105 S.Ct. at 1716; Parker, 317 U.S. at 351, 63 S.Ct. at 314.

Moreover, the state proceedings addressed different issues. Without a hearing before the OPUC, and without trial, the only Court articulating its rationale applied an administrative law standard to determine that the OPUC Orders "are supported by substantial evidence. . . ." PGE App. O-2. States do not determine whether immunity from the federal antitrust laws arises; that determination is for the federal courts. See Hallie, 471 U.S. at 44 n.8, 105 S.Ct. at 1719 n.8 (decision of Wisconsin Supreme Court does not decide question of state action immunity, although it may be "instructive" on questions of legislative intent). The federal courts' antitrust analysis focuses on whether the state sanctioned anticompetitive conduct *before* that conduct occurred. What the state does 20 years after the private monopolists divided their markets, and after the plaintiff's antitrust injury has been sustained, is unimportant. Issues of full faith and credit simply do not arise under the unique circumstances of this case where the OPUC attempted to validate, after the fact, PGE's anticompetitive conduct.

E. No Conflict Among The Circuits Exists

1. Praxair

The Ninth Circuit's decision in this case does not conflict with the Eleventh Circuit's opinion in Praxair, Inc. v. Florida Power & Light Co., 64 F.3d 609 (11th Cir. 1995), *cert. denied*, __U.S.__, 116 S.Ct. 1678 (1996) (Praxair). Both opinions applied the same principles of antitrust immunity. The different results are due to differences in facts: clear authorization of anticompetitive conduct was present in the Praxair case and absent in this case.

In Praxair, as in this case, antitrust immunity turned on whether the state clearly authorized and affirmatively expressed its approval of a territorial market division between two electric utilities. 64 F.3d at 611. The relevant state action was an order of the state utility regulatory commission. Id. The Praxair court focused its attention on whether specific territory had been included in the state Commission's order. The Court expressly cited language from the state Commission's order which "allow[ed the utilities] to agree not to serve within certain areas when requested to do so by a person applying for electrical service. . . " 64 F.3d at 612. The Court concluded "[n]either utility could deviate from the order without prior approval of the Commission." Id. The Court reviewed the order and its exhibits to interpret the order (and not the subsequent Commission acts) as allocating disputed territory and therefore concluded that the order sanctioned the challenged anticompetitive conduct.

As did the Eleventh Circuit in Praxair, the Ninth Circuit in this case confined its analysis to the administrative order that completes the relevant state action. Unlike Praxair, the order in this case did not sanction anticompetitive conduct, either expressly or by implication.

In dicta, Praxair suggested that the parties' conduct after the administrative order was issued was relevant in determining whether the state sanctioned anticompetitive conduct. The court characterized its analysis as a factual inquiry. 64 F.3d at 612. A similar factual inquiry conducted in this case reveals striking dissimilarities with Praxair: (1) to obtain the necessary approval from the City of Portland, PGE and PP&L intentionally removed language from their Agreement that would call for exclusive service territories -- there was no innocent misunderstanding; (2) the District Court found, and the Circuit Court agreed, that the 1972 Agreement and the OPUC order never approved exclusive service territories; and (3) the utilities and the OPUC itself expressed doubts as to the creation of exclusive service territories after 1972. The unique facts of this case make Praxair inapplicable.

2. Lease Lights

The Circuit Court's decision is consistent with the Tenth Circuit Court of Appeal's decision in Lease Lights, Inc. v. Public Serv. Co. of Oklahoma, 849 F.2d 1330 (10th Cir. 1988) (Lease Lights). Lease Lights addressed circumstances in which a state regulatory commission expressly *required* the utility to collect the rates that plaintiffs claimed resulted in predatory pricing. 849 F.2d at 1334 ("the lower rates charged by PSO which the plaintiffs claim destroyed their business, was compelled by an independent decision of the Commission that PSO could not disobey."). Here, the OPUC never exercised its authority to sanction anticompetitive conduct and the type of clear authorization of conduct found in Lease Lights simply cannot be found. The Lease Lights case is inapposite.

In the case presently before this Court, there was no good faith reliance on the exercise of regulatory authority. As discussed above, the OPUC did not act in 1972 to prevent the two utilities from competing, and indeed PGE ultimately agreed, without prior OPUC approval, to permit PP&L to serve Columbia Steel.

F. The Issues In This Case Arise Infrequently

This case presents a discrete set of facts, not likely to repeat themselves. State law permits an administrative agency to determine on a case-by-case basis whether, and in what parts of the state, competition should be eliminated. While that might not be unusual, the question presented is whether that agency said "yes" or "no" to competition. Very few state action cases arise from highly specific, case-by-case determinations by administrative agencies, such as the 1972 Order.

The dearth of such cases is not surprising. Administrative agencies speak through their orders. When an administrative agency acts on the application of a regulated industry, the order will either say either "yes" or "no" to the application, and there is no question whether the state sanctioned the anticompetitive conduct at issue. The OPUC's 1972 Order expressly authorizing an exclusive service territory in Rainier, and the OPUC's 1992 Order expressly granting exclusive service territories to PGE and PP&L in Portland illustrate that point. It is not difficult to obtain a clear order granting exclusive territories if the legislatively mandated process for doing so is followed. Facts like these do not arise often, and the decisions in such cases are necessarily fact-specific. The Court can anticipate few cases presenting issues similar to those of this case.

Even fewer such cases will appear in the future. The few cases that address state action immunity arising from an agency's ruling on a specific application arise in the context of utility regulation. Public utilities have a unique relationship to the public, and since the early 1900s, state legislatures have perceived a need for intense scrutiny of utility operations to protect the public. But the utility industry is changing dramatically. Nearly every state is considering or implementing measures to deregulate utilities and to displace regulation with competition. See, e.g., Benjamin J. Holden, Electric-Deregulation Machine Picks Up Steam, Wall St. J.,

July 14, 1997, at B4. With the deregulation of electric and natural gas utilities, cases addressing whether a state statute or a regulatory body sanctioned exclusive service territories will be increasingly rare.

G. The Result Is Fair

Finally, PGE complains that it was "fundamentally unjust" to deny PGE a jury trial on the question of PGE's intent. Pet. at 30. To the best of Columbia Steel's knowledge, none of the parties below, *including PGE* requested a jury trial in the manner required by the District Court's Local Rules 120-1 (g)(3) and 200-2. PGE therefore, waived its right to a jury trial. Fed. R. Civ. P. 38(d). Moreover, PGE did not raise this "fundamentally unjust" issue before the Circuit Court. Again it has waived its right to assert the need for a jury trial and to contend before this Court that it was error to decide the state action question without submitting it to a jury.

In any event, and perhaps more importantly, PGE acknowledges that there are no material facts in dispute. Pet. at 2. The central issues in this case were decided on *cross-motions* for summary judgment -- PGE itself agreed in its pleadings that the material facts were not in dispute. The District Court granted summary judgment because it concluded that any sanction of the admitted conspiracy to monopolize would have to be found in the operative OPUC Order. Thus, there is no factual issue to try. Based on PGE's own admissions of fact, the result is fair and consistent with this Court's precedent.

PGE invites this Court to abandon its "clearly articulated and affirmatively expressed" bright line test in favor of a "subjective judgment" test. If PGE succeeds, then sellers, buyers and regulators will never know in advance whether a claimed right to monopolize is enforceable. Such a result would be a new, judicially created exception to the antitrust laws that would require probing into unknowable subjective beliefs and

yield uncertainty amongst consumers, competitors, regulators, and even the monopolists themselves. The Court should reject PGE's invitation.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

Michael C. Dotten
Counsel of Record
Eric R. Todderud
HELLER, EHRMAN, WHITE
& McAULIFFE
Suite 1750
200 S.W. Market Street
Portland, OR 97201-5718
(503) 227-7400

Attorneys for Respondent

APPENDIX TO
RESPONDENT'S BRIEF IN OPPOSITION

BEFORE THE

PUBLIC UTILITY COMMISSIONER OF OREGON

In the Matter of the Joint Application of PACIFIC POWER & LIGHT COMPANY and PORTLAND GENERAL ELECTRIC COMPANY for an order(s) (1) approving and authorizing the exchange of electric utility facilities located in Multnomah and Columbia Counties, Oregon; and (2) approving the assignment to Portland General Electric Company of certain service territory in Columbia County, Oregon, previously allocated to Pacific Power & Light Company.	)	DOCKET NO. U-F- APPLICATION

Pacific Power & Light Company, a Maine corporation (hereinafter called "Pacific"), and Portland General Electric Company, an Oregon corporation (hereinafter called "Portland General"), hereby apply for an order of the Public Utility Commissioner of Oregon (hereinafter called the "Commissioner"), pursuant to the provisions of Chapter 757 ORS, authorizing Pacific and Portland General to exchange certain electric utility facilities located in Multnomah and Columbia Counties, Oregon, all as hereinafter set forth:

PACIFIC POWER & LIGHT COMPANY

(a) Exact Name of Applicant and Address of Principal Business Office:

Pacific Power & Light Company
Public Service Building
Portland, Oregon - 97204

(b) State in which Incorporated, Date of Incorporation, and Other States in which Authorized to Transact Utility Operations:

Pacific was incorporated under the laws of the State of Maine on June 16, 1910, and has qualified to do business as a foreign corporation in the States of Oregon, Wyoming, Washington, California, Montana and Idaho.

(c) Name and Address of Person Authorized to Receive Notices and Communications in Respect to this Application:

Notices and communications with respect to this Application should be sent to:

H. W. Millay, Secretary
Pacific Power & Light Company
Public Service Building
Portland, Oregon - 97204

The Commissioner is respectfully requested to send copies of all such notices and communications to:

Robert F. Harrington
Rives, Bonyhadi & Hall
1400 Public Service Building
Portland, Oregon - 97204

(d) Names, Titles and Addresses of Principal Officers:

Glenn L. Jackson Chairman of the Board	Public Service Building Portland, Oregon 97204
Don C. Frisbee President	Public Service Building Portland, Oregon 97204
John Y. Lansing Executive Vice President	Public Service Building Portland, Oregon 97204
George L. Beard Senior Vice President	Public Service Building Portland, Oregon 97204
Allan C. Bartholomew Senior Vice President	Public Service Building Portland, Oregon 97204
Howard Arnett Vice President	Post Office Box 860 Casper, Wyoming 82602
C. P. Davenport Vice President	Public Service Building Portland, Oregon 97204
G. Eldon Drennan Vice President	Public Service Building Portland, Oregon 97204
John H. Geiger Vice President	Public Service Building Portland, Oregon 97204
A. M. Gleason Vice President	Public Service Building Portland, Oregon 97204
Philip G. Humphreys Vice President	Public Service Building Portland, Oregon 97204
R. B. Lisbakken Vice President	Public Service Building Portland, Oregon 97204

R. W. Moench Vice President	Post Office Box 860 Casper, Wyoming 82602
Jack T. Stiles Vice President	Public Service Building Portland, Oregon 97204
E. O. Thoman Vice President	Post Office Box 1288 Yakima, Washington 98901
H. W. Millay Secretary	Public Service Building Portland, Oregon 97204

(e) General Character of Business with Designation of Territories Served:

Pacific is an operating public utility engaged principally in the business of generating, purchasing, transmitting, distributing and selling electric energy in Oregon, Wyoming, Washington, California, Montana and Idaho.

Pacific also supplies water, steam heat and telephone service in various communities in its service area.

For further information with regard to the general character of Pacific's business and the territory served by it, reference is made to Pacific's Annual Reports to the Commissioner and other documents and data pertinent to Pacific on file in the office of the Commissioner.

(f) Pacific's Capital Stock:

For statement as to classes and series of capital stock as of December 31, 1971, reference is made hereby to Item (f) in Applicant's Application to the Commissioner dated March 2, 1972, for authority to offer, issue and sell shares of its Common Stock, Docket No. U-F-2923.

(g) Pacific Long-Term Debt:

For statement as to classes and series of long-term debt and notes, reference is made hereby to Item (g) in Applicant's Application to the Commissioner dated March 2, 1972, referred to in Item (f) hereof.

PORTLAND GENERAL ELECTRIC COMPANY

(a) Exact Name of Applicant and Address of Principal Business Office:

Portland General Electric Company
Electric Building
Portland, Oregon 97205

(b) State in which Incorporated and Date of Incorporation:

Portland General Electric Company was incorporated under the laws of the State of Oregon on July 25, 1930, for perpetual duration. It is qualified and transacts business only in the State of Oregon.

(c) Name and Address of Person Authorized to Receive Notices and Communications in Respect to this Application:

Notices and communications with respect to this Application should be sent to:

Warren Hastings
Portland General Electric Company
621 S. W. Alder Street
Portland, Oregon 97205

(d) Names, Titles and Addresses of Principal Officers:

Frank M. Warren President	621 S. W. Alder Street Portland, Oregon 97205
Hilbert S. Johnson Senior Vice President	621 S. W. Alder Street Portland, Oregon 97205
Ralph H. Millsap Senior Vice President	621 S. W. Alder Street Portland, Oregon 97205
A. J. Porter Senior Vice President	621 S. W. Alder Street Portland, Oregon 97205
Robert H. Short Senior Vice President and Treasurer	621 S. W. Alder Street Portland, Oregon 97205
H. H. Phillips Vice President, Corporate Counsel and Secretary	621 S. W. Alder Street Portland, Oregon 97205
Estes Snedecor, Jr. Vice President	621 S. W. Alder Street Portland, Oregon 97205
F. D. Wieden Vice President	621 S. W. Alder Street Portland, Oregon 97205
J. L. Williams Vice President	621 S. W. Alder Street Portland, Oregon 97205
Carrol W. Brissenden Assistant Vice President	621 S. W. Alder Street Portland, Oregon 97205

Edgar F. Wildfong Assistant Vice President	621 S. W. Alder Street Portland, Oregon 97205
Harry L. Clark Controller and Assistant Treasurer	621 S. W. Alder Street Portland, Oregon 97205
James L. Staines Assistant Treasurer	621 S. W. Alder Street Portland, Oregon 97205
John J. Coughlin Assistant Secretary	621 S. W. Alder Street Portland, Oregon 97205
Warren Hastings Assistant Secretary	621 S. W. Alder Street Portland, Oregon 97205

(e) General Character of Business with Designation of Territories Served:

Portland General is engaged in the generation, purchase, transmission, distribution and sale of electric energy for public use in Clackamas, Columbia, Hood River, Jefferson, Marion, Multnomah, Polk, Washington and Yamhill Counties, Oregon, and has acquired a 2-1/2% interest in a coal-fired generating facility near Centralia, Washington. Reference is made to the map showing territory served, filed by the Applicant on October 20, 1971, as a part of Exhibit I (Registration Statement filed with the Securities and Exchange Commission) with the Public Utility Commissioner of Oregon in Docket U-F-2892.

(f) Portland General's Capital Stock:

Reference is made to Portland General's Application to the Commissioner docketed as U-F-2935.

(g) Portland General's Long-Term Debt:

Reference is made to Portland General's Application to the Commissioner docketed as U-F-2935.

I.

DISPOSITION OF FACILITIES

This Application is for an order of the Commissioner approving and authorizing (1) the transfer by Pacific to Portland General of certain electric utility facilities and properties owned, operated and maintained by Pacific in the Cities of Portland and Rainier, Oregon, and in adjacent areas of Multnomah and Columbia Counties, and (2) the transfer by Portland General to Pacific of certain electric utility facilities and properties owned, operated and maintained by Portland General in the City of Portland and adjacent areas of Multnomah County, Oregon. The properties to be exchanged and their locations are described and shown in Exhibits A through H to an Agreement between Pacific and Portland General, dated July 18, 1972, designated as Exhibit I to this Application, and by this reference made a part hereof.

1. Description of Facilities

Pacific will transfer to Portland General (1) certain electric distribution plant, including distribution substations, poles, lines, transformers, meters, related distribution facilities, and all easements necessary for the operation thereof, owned, operated and maintained by Pacific in the area designated as Pacific's Rainier Service District, and (2) facilities and properties of the same character owned, operated and maintained by Pacific in portions of the City of Portland and areas adjacent thereto. Said facilities and properties are described and shown in Exhibits A, B, C, D, E and G to the aforementioned Agreement, Exhibit I hereto.

Portland General will transfer to Pacific certain electric distribution plant, including distribution substations, poles, lines, transformers, meters, related distribution facilities, and all easements necessary for the operation thereof, owned, operated and maintained by Portland General within portions of the City of Portland and areas adjacent thereto. Said facilities and properties are described and shown in Exhibits A, B, D, E and H to the aforementioned Agreement, Exhibit I hereto.

Approximately 28,000 customers are served by the facilities to be transferred by Pacific to Portland General, and approximately 38,000 customers are served by the facilities to be transferred by Portland General to Pacific. Pacific and Portland General will continue to operate the facilities acquired from the other in the same manner as heretofore.

2. Cost of Facilities (by Primary Account)

Transferred by Pacific to Portland General:

To be furnished upon completion of inventory of facilities.

Transferred by Portland General to Pacific:

To be furnished upon completion of inventory of facilities.

3. Applications to Other Regulatory Bodies

Pacific Power & Light Company will file with the Federal Power Commission an Application seeking an order authorizing the transfer by Portland General to Pacific of the facilities and properties described herein.

4. Transfer Consistent with Public Interest

The City of Portland, by Ordinance No. 134416, passed April 26, 1972, effective May 26, 1972, consented to the exchange by Portland General and Pacific of those facilities located in Portland described herein.

As a result of the proposed exchange and sale of property, uneconomical duplication of services and facilities will be minimized. Presently, lines of Pacific and Portland General intersect, and each company serves customers within areas served by the other. Approval ot his [sic] Application will result in more cohesive operating units and will enable Pacific and Portland General to render a more efficient and economical electric utility service to their respective customers.

6. Reasons for Exchange of Facilities

For reasons for the proposed exchange of facilities and benefits to be derived by customers of Pacific and Portland General, and the public, reference is made to the information set forth in Paragraph 5 hereof.

7. Amount of Securities Owned by Applicants of Utilities from which Securities are Proposed to be Acquired

Not applicable.

8. Franchises

Both Applicants are authorized to provide electric service in the City of Portland. Pacific holds a franchise to provide electric service in the City of Rainier, expiring April 18, 1981, and will assign said franchise to Portland General. Portland General holds a franchise to provide electric service in the City of Maywood Park, expiring August 1, 1977, and will assign said franchise to Pacific.

The laws of Oregon authorize Applicants to construct and maintain lines conveying electric energy along the public roads outside municipal corporations, together with the necessary fixtures therefor, subject to the right of the State Highway Commission with regard to State highways and County courts or County Commissioners with respect to County roads, to designate the location upon such highways and roads where such fixtures may be located.

II

ASSIGNMENT OF SERVICE TERRITORY

This Application is further for an order of the Commissioner, pursuant to the provisions of ORS 758.460, approving the assignment to Portland General of all rights acquired by Pacific in and to certain service territory allocated to Pacific as its exclusive service territory by the Commissioner's Order No. 38498 dated October 16, 1962, Docket No. 2332. The territory sought to be assigned is shown in Exhibit 1 hereto and described in Exhibit 2 hereto; the proposed instrument of Assignment is attached as Exhibit 3 hereto, and a copy of a franchise granted to Pacific to provide electric utility service in the City of Rainier, which franchise will be assigned to Portland General, is attached as Exhibit 4 hereto. Said Exhibits 1, 2, 3 and 4 are by this reference made a part hereof.

PACIFIC'S EXHIBITS

The following exhibits of Pacific are made Exhibits to this Application:

Exhibit	Incorporated by reference to: Docket Number	Exhibit	
A	U-F-2885	A	Composite Certificate of Organization of Applicant as last amended on June 10, 1971.
B	U-F-2885	B	By-Laws of Applicant, as last amended on June 15, 1971.
C			Resolutions adopted by the Board of Directors of Applicant authorizing the transactions to which this Application relates.
D-1	U-F-1452	1(7)	Mortgage and Deed of Trust, dated as of July 1, 1947, from Applicant to Guaranty Trust Company of New York (now Morgan Guaranty Trust Company of New York) as Corporate Trustee.

Exhibit	Incorporated by reference to: Docket Number	Exhibit	
D-2	U-F-1496	2	Applicant's First Supplemental Indenture, dated as of April 1, 1950.
D-3	U-F-1646	6	Applicant's Second Supplemental Indenture, dated as of March 1, 1952.
D-4	U-F-1690	3	Applicant's Third Supplemental Indenture, dated as of September 1, 1952.
D-5	U-F-1795	3	Applicant's Fourth Supplemental Indenture, dated as of April 1, 1954.
D-6	U-F-1827	3	Applicant's Fifth Supplemental Indenture, dated as of August 1, 1954.
D-7	U-F-1910	3	Applicant's Sixth Supplemental Indenture, dated as of October 1, 1955.

Exhibit	Incorporated by reference to: Docket Number	Exhibit	
D-8	U-F-2002	5	Applicant's Seventh Supplemental Indenture, dated as of January 1, 1957.
D-9	U-F-2056	4	Applicant's Eighth Supplemental Indenture, dated as of September 1, 1957.
D-10	U-F-2085	5	Applicant's Ninth Supplemental Indenture, dated as of January 1, 1958.
D-11	U-F-2133	4	Applicant's Tenth Supplemental Indenture, dated as of July 1, 1958.
D-12	U-F-2257	4	Applicant's Eleventh Supplemental Indenture, dated as of September 1, 1960.
D-13	U-F-2281	G	Applicant's Twelfth Supplemental Indenture, dated as of June 22, 1961.

Exhibit	Incorporated by reference to: Docket Number	Exhibit	
D-14	U-F-2326	E	Applicant's Thirteenth Supplemental Indenture, dated as of April 1, 1962.
D-15	U-F-23-54	E	Applicant's Fourteenth Supplemental Indenture, dated as of December 1, 1962.
D-16	U-F-2355	E	Applicant's Fifteenth Supplemental Indenture, dated as of April 1, 1963.
D-17	U-F-2395	D	Applicant's Sixteenth Supplemental Indenture, dated as of August 1, 1963.
D-18	U-F-2458	D	Applicant's Seventeenth Supplemental Indenture, dated as of October 1, 1964.
D-19	U-F-2513	D	Applicant's Eighteenth Supplemental Indenture, dated as of October 1, 1965.

	Incorporated by reference to:		
Exhibit	Docket Number	Exhibit	
D-20	U-F-2708	D-20	Applicant's Nineteenth Supplemental Indenture, dated as of December 15, 1967.
D-21	U-F-2760	D	Applicant's Twentieth Supplemental Indenture dated as of May 1, 1969.
D-22	U-F-2774	D	Applicant's Twenty-First Supplemental Indenture, dated as of November 1, 1969.
D-23	U-F-2817	D	Applicant's Twenty-Second Supplemental Indenture, dated as of July 1, 1970.
D-24	U-F-2848	D	Applicant's Twenty-Third Supplemental Indenture, dated as of February 1, 1971.
D-25	U-F-2885	D	Applicant's Twenty-Fourth Supplemental Indenture, dated as of October 1, 1971.

Exhibit	Incorporated by reference to: Docket Number	Exhibit	
D-26	U-F-2193	1-R Sec 8 [1]	Indenture, dated as of October 1, 1941, from the former Rawlins Electric Company to Irving Trust Company, as Trustee.
D-27	U-2193	1-R Sec 8 [1]	Rawlins Second Supplemental Indenture, dated as of November 1, 1955.
D-28	U-F-2193	1-R Sec 8 [1]	Rawlins Third Supplemental Indenture, dated as of November 1, 1957.
D-29	U-F-2200	6	Debenture Agreement, dated as of September 1, 1959, between Applicant and

[1] Principal provisions of Mortgage and Supplemental Indentures summarized in Section 8 of the Statement of Financial Condition of Rawlins Electric Company filed pursuant to Rule 2.107 of the Commissioner's then effective Rules and Regulations as Exhibit 1-R in said Docket No. U-F-2193. Extra copies of Exhibits D-25, D-26 and D-27 are not available for filing with the Commissioner. Applicant hereby agrees to mail copies of each such instrument available to the Commissioner for his examination, upon request. Securities outstanding under the provisions of the Rawlins Indenture, as supplemented, do not exceed 5%, of the total assets of Applicant.

Exhibit	Incorporated by reference to: Docket Number	Exhibit	
			The Chase Manhattan Bank, as Trustee.
D-30	U-F-2458	D-23	First Supplemental Indenture, dated as of June 22, 1961, to said Debenture Agreement.
D-31	U-F-2708	D-31	Credit Agreement, dated as of April 1, 1968, between Applicant and the banks named therein.
D-32	U-F-2885	D-30	Credit Agreement, dated as of June 30, 1971, between Applicant and the banks named therein.
E			See Applicant's latest Balance Sheet on file with the Commissioner.
F			Not applicable. Applicant has no contingent liabilities.

Exhibit	Incorporated by reference to: Docket Number	Exhibit	
G			See Applicant's latest Income Statement on file with the Commissioner.
H			See Applicant's latest Surplus Statement on file with the Commissioner.
I			Copy of Agreement between Applicants Pacific Power & Light Company and Portland General Electric Company.
J			Proposed Journal Entries.
K			Not applicable.

PORTLAND GENERAL'S EXHIBITS

The following exhibits of Portland General are made Exhibits to this Application:

Exhibit	Incorporated by reference to: Docket Number	Exhibit	
A	U-F-2471	A	Articles of Incorporation of Portland General Electric Company with all amendments.
B	U-F-2471		Bylaws of Portland General Electric Company as last amended on February 8, 1966.
C			Resolution adopted by the Board of Directors of Portland General Electric Company, authorizing the transaction to which this Application relates.
D-1	U-F-1155		Indenture of Mortgage and Deed of Trust, dated July 1, 1945, from Portland General Electric Company to The Marine Midland Trust Company of New York (now known as Marine Midland Grace Trust Company of New York).
D-2	U-F-1323		First Supplemental indenture dated November 1, 1947.
D-3	U-F-1401		Second Supplemental Indenture dated November 1, 1948.
D-4	U-F-1682		Third Supplemental indenture dated May 1, 1952.

Exhibit	Incorporated by reference to: Docket Number	Exhibit	
D-5	U-F-1769		Fourth Supplemental Indenture dated November 1, 1953.
D-6	U-F-1845		Fifth Supplemental Indenture dated November 1, 1954.
D-7	U-F-1980		Sixth Supplemental Indenture dated September 1, 1956.
D-8	U-F-2036		Seventh Supplemental Indenture dated June 1, 1957.
D-9	U-F-2081	2	Eighth Supplemental Indenture dated December 1, 1957.
D-10	U-F-2247	2	Ninth Supplemental Indenture dated June 1, 1960.
D-11	U-F-2310	2	Tenth Supplemental Indenture dated November 1, 1961.
D-12	U-F-2366	D	Eleventh Supplemental Indenture dated February 1, 1963.
D-13	U-F-2390	D	Twelfth Supplemental Indenture dated, June 1, 1963.
D-14	U-F-2427	D	Thirteenth Supplemental Indenture dated April 1, 1964.

Exhibit	Incorporated by reference to: Docket Number	Exhibit	
D-15	U-F-2471	D	Fourteenth Supplemental Indenture dated March 1, 1965.
D-16	U-F-2574		Fifteenth Supplemental Indenture dated June 1, 1966.
D-17	U-F-2666		Sixteenth Supplemental Indenture dated October 1, 1967.
D-18	U-F-2803		Seventeenth Supplemental Indenture dated April 1, 1970.
D-19	U-F-2833		Eighteenth Supplemental Indenture dated November 1, 1970.
D-20	U-F-2136	2	5% Sinking Fund Debenture Agreement, dated June 1, 1958, from Portland General Electric Company to The Chase Manhattan Bank, Trustee.
E			See Portland General Electric Company's latest Balance Sheet on file with the Commissioner.
F			A Statement of Contingent Liabilities as of December 31, 1971. See notes to Balance

Exhibit	Incorporated by reference to: Docket Number	Exhibit	
			Sheet on file with Commissioner.
G			See Portland General Electric Company's latest Income Statement on file with the Commissioner.
H			See Portland General Electric Company's latest Surplus Statement on file with the Commissioner.
I			Copy of proposed Journal Entries to be used to record the transaction upon Portland General Electric Company's books.

ASSIGNMENT EXHIBITS

The following exhibits in connection with the Assignment of Service Territory are made Exhibits to this Application:

Exhibit Number	Description
1	Territory sought to be assigned to Portland General Electric Company by Pacific Power & Light Company,

previously allocated to Pacific Power & Light Company as its exclusive service territory by the Commissioner's Order No. 38498 dated October 16, 1962, Docket No. 2332.

2 Description of territory sought to be assigned to Portland General Electric Company by Pacific Power & Light Company.

3 Proposed instrument of Assignment covering territory sought to be assigned to Portland General Electric Company by Pacific Power & Light Company.

4 Franchise of Pacific Power & Light Company sought to be assigned to Portland General Electric Company, covering electric utility service in the City of Rainier, Oregon.

WHEREFORE, Applicants respectfully request that the Commissioner make and enter an Order granting this Application.

DATED at Portland, Oregon, this 25th day of July, 1972.

PACIFIC POWER & LIGHT COMPANY

By /s/ A. C. Bartholomew
A. C. Bartholomew
Senior Vice President

PORTLAND GENERAL ELECTRIC COMPANY

By /s/ Hilbert S. Johnson
Hilbert S. Johnson
Senior Vice President

RIVES, BONYHADI & HALL

By /s/ Robert F. Harrington
Robert F. Harrington

OFFICE AND POST OFFICE ADDRESS:

1400 Public Service Building
Portland, Oregon 97204
Telephone No: 224-3920

PHILLIPS, COUGHLIN, BUELL, STOLOFF & BLACK

By /s/ Warren Hastings
Warren Hastings

OFFICE AND POST OFFICE ADDRESS:

Electric Building
Portland, Oregon 97205
Telephone No: 222-9821

STATE OF OREGON)
) ss.
County of Multnomah)

I, A. C. BARTHOLOMEW, being first duly sworn, depose and say: That I am Senior Vice President of PACIFIC POWER & LIGHT COMPANY, one of the Applicants in the foregoing Application; that I have read said Application,

including the Exhibits thereto, and know the contents thereof, and the same is true to the best of my knowledge and belief.

/s/ A.C. Bartholomew

Subscribed and sworn to before me this 25th day of July, 1972.

/s/ illegible
Notary Public for Oregon
My Commission expires: 2/19/73

STATE OF OREGON)
) ss.
County of Multnomah)

I, HILBERT S. JOHNSON, being first duly sworn, depose and say: That I am Senior Vice President of PORTLAND GENERAL ELECTRIC COMPANY, one of the Applicants in the foregoing Application; that I have read said Application, including the Exhibits thereto, and know the contents thereof, and the same is true to the best of my knowledge and belief.

/s/ Hilbert S. Johnson

Subscribed and sworn to before me this 25th day of July, 1972.

/s/ Karin M. Burnham
Notary Public for Oregon
My Commission expires: 4-13-73

Exhibit 1	Map of Service Area Boundary [omitted--applies to Rainier, Oregon only]
Exhibit 2	Service Area Legal Description [omitted--applies to Rainier, Oregon only]
Exhibit 3	Assignment of Allocated Territory [omitted--applies to Rainier, Oregon only]
Exhibit 4	Ordinance No. 788 [omitted--applies to Rainier, Oregon only]

Supreme Court, U.S.
FILED
AUG 26 1997
CLERK

(5)

No. 97-49

In The

Supreme Court of the United States

October Term, 1997

PORTLAND GENERAL ELECTRIC COMPANY,
Petitioner,

v.

COLUMBIA STEEL CASTING CO., INC.
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

Barbee B. Lyon
Counsel of Record
James C. Loy
David S. Aman
TONKON, TORP, GALEN,
MARMADUKE & BOOTH
1600 Pioneer Tower
888 S.W. Fifth Avenue
Portland, Oregon 97204
Telephone: (503) 221-1440
Attorneys For Petitioner

Filed August 25, 1997

18pp

ADDITIONAL PARTIES TO THE PROCEEDING

The case caption contains the names of all the parties to the proceeding in the Court of Appeals.

Since the date the Petition was prepared, the stock of Petitioner Portland General Electric Company has been acquired by Enron Corporation. Enron Corporation has a partial interest in the following entities:

Alliance Resources Plc.
Beau Canada Exploration Ltd.
Comstock Resources, Inc.
Enron Capital L.L.C.
Enron Capital Resources L.P.
Enron Capital Trust Resources L.P.
Enron Capital Trust I and II
Enron Global Power and Pipelines L.L.C.
Enron Oil & Gas Company
EOTT Energy Partners, L.P.
Forest Oil Corporation
Hanover Compressor Company
Northern Border Partners, L.P.
Place Resources Corp.
Queen Sand Resources, Inc.
Titan Exploration, Inc.

TABLE OF CONTENTS

I. This case is not factbound.....1

1. Columbia Steel's brief is not trustworthy.....1

2. The factual disputes were resolved against Columbia Steel in the prior state adjudication.....2

3. Columbia Steel's supposed facts flout the summary judgment standard.....4

II. Columbia Steel's legal arguments are in error.....4

1. The Court of Appeals' variation of the "clear articulation" requirement is in error.....5

2. The issues were fully raised before the Court of Appeals.....7

3. Columbia Steel confuses the issue of the state's "intent."....7

4. Columbia Steel's argument is not supported by Areeda & Turner.....8

5. The Court of Appeals failed to give full faith and credit to the state adjudication.....8

6. The decision below is in conflict with *Praxair*.....9

III. These issues arise often and are of the greatest importance.....9

IV. PGE was deprived of a trial.....10

SUPPLEMENTARY APPENDIX

(Table of Contents of one of Columbia Steel's briefs in state court)

TABLE OF AUTHORITIES

Cases

California Retail Liquor Dealers Assn.
v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) 8

City of Columbia v. Omni Outdoor Advertising,
499 U.S. 365, 370-72 (1991) 6, 8

F.T.C. v. Ticor Title Insurance Co., 504 U.S. 389 (1992) 5

Patrick v. Burget, 486 U.S. 94 (1988) 6

Praxair, Inc. v. Florida Power & Light Co.,
64 F.3d 609 (11th Cir. 1995), cert. denied,
__ U.S. __, 116 S. Ct. 1678, 134 L. Ed.2d 781
(May 13, 1996) 9

Southern Motor Carriers Rate Conference
v. U.S., 471 U.S. 48 (1985) 5

Statutes

Or. Rev. Stat 756.598.....3

N.C. Gen. Stat. § 62-152.1(b) 5

I. This case is not factbound

Columbia Steel's brief begins by disputing the facts in order to persuade the Court that this case is factbound.

1. Columbia Steel's brief is not trustworthy.

The first reason this case is not factbound is that Columbia Steel's account of the facts is unreliable. For a quick demonstration of just how unreliable, consider Columbia Steel's two-page argument (at pp. 8-10) that OPUC did *not* regard Portland as having been allocated between PGE and PP&L. In our petition we had demonstrated the opposite, that OPUC had asserted for many years that Portland was allocated and that competition was forbidden. (Pet. 5-7, 18-19.) In fact, that was the very reason Columbia Steel demanded an injunction against OPUC. Compare then what Columbia Steel alleged in its complaint against OPUC in 1990 with its opposite statement now to this Court:

Columbia Steel's brief in this Court	**Columbia Steel's complaint in 1990**
"Contrary to PGE's assertions, the OPUC did not insist that it had allocated exclusive service territories in Portland until a 1992 Order that came long after the causes of action in this case arose." (Columbia Steel's brief at 9.)	"The OPUC contends that the [1972 Agreement] created allocated service territories within Portland and that PP&L is barred from providing electric service to Columbia Steel. . . Columbia [Steel] is entitled to an injunction prohibiting [OPUC] from seeking to enforce the [1972 Agreement] as an exclusive service territory agreement." (ER 35, 38.)[1]

[1] OPUC declared in its answer to this allegation that it *did* so [continued]

A party cannot render a case factbound by inventing new facts on the spot to suit the occasion. Columbia Steel doesn't even acknowledge that the District Court made a finding of fact opposite to what Columbia Steel would have this Court believe. (*See* Pet. at 11.) Space does not permit us to respond to every misleading statement of fact in Columbia Steel's brief.

2. The factual disputes were resolved against Columbia Steel in the prior state adjudication.

The main thrust of Columbia Steel's argument is that the 1972 Order was insufficient *under Oregon law* to effect an allocation of Portland. Most of the supposed facts in Columbia Steel's brief are in aid of that argument. It is the same argument, and the same facts, that Columbia Steel presented seven years ago in the OPUC proceeding. (To appreciate that it is the same, we invite the Court to glance at the Supplemental Appendix in the back of this brief, where we reproduce the table of contents of one of Columbia Steel's briefs in state court in 1992; *see especially* the last page.) OPUC rejected that argument, as did the Oregon courts to which Columbia Steel appealed. This case can become factbound only if the prior state adjudication upon these same facts is dishonored. The "Questions Presented" at the front of Columbia Steel's brief all assume that the final state adjudication was wrong.

---

contend. (ER 75, ¶ 28.) OPUC went on to add that what created the allocated territories was its 1972 Order, not the parties' Agreement: " [OPUC contends] that Order No. 72-870, as opposed to the [1972 Agreement] created service territories within Portland." *Id.*

Columbia Steel disparages that prior state adjudication, complaining that OPUC disregarded "overwhelming evidence to the contrary." (Columbia Steel brief at 19.) Columbia Steel protests that the Oregon trial court which conducted the first level of judicial review affirmed OPUC "without any evidentiary hearing,"[2] and that the Oregon appellate courts gave the OPUC order a "cursory review."[3] (Columbia Steel brief at 18, 19.) To appreciate how skewed is Columbia Steel's criticism of the procedural adequacy of the state proceeding, we encourage the Court to review OPUC's refutation at Appendix N 3-5.

That Columbia Steel finds it necessary to attack the prior state adjudication is a sign that Columbia Steel cannot effectively distinguish it. As we pointed out in our petition (at 8-9, 26-27), the state adjudication explicitly held that the 1972 Order satisfied all the requirements of the Oregon statutes for an allocation of territories and customers, and that Portland had therefore been lawfully allocated under Oregon law in *1972*. Columbia Steel's brief refuses to face that explicit holding in the state adjudication, and pretends the holding was something else, something it finds easier to attack.[4]

---

2 This was the procedure the Oregon statutes required the trial court to follow. Review of the OPUC decision must be on the record established at the OPUC. Or. Rev. Stat. 756.598.

3 That the Oregon Court of Appeals affirmed without opinion does not warrant the pejorative label "cursory review." The case was briefed fully and argued to the Oregon Court of Appeals. The disposition without opinion tells us rather that the Oregon Court of Appeals found little merit in Columbia Steel's arguments.

4 Although Columbia Steel persists in arguing that the 1972 Order was inadequate under *Oregon* law, it nevertheless refuses to face the OPUC's legal analysis as to why the 1972 Order *was* effective under Oregon law to allocate Portland. If the Court were to examine OPUC's analysis beginning at App. M-16, it would see that Columbia Steel never deals with OPUC's reasoning, but

3. Columbia Steel's supposed facts flout the summary judgment standard.

Many of Columbia Steel's supposed facts attribute devious motives to PGE and attack PGE's good faith. Columbia Steel is hawking an extreme view of the evidence in complete disregard for the standard of review on summary judgment. Even the District Court rejected Columbia Steel's extreme view:

> "[This court] has never ruled or implied that PGE acted in bad faith, but no belief, however reasonable it may have been, alters the legal effect of the 1972 Agreement and Order No. 72-870 of the OPUC." (App. F-18.)[5]

The bottom line is that OPUC told PGE that Portland was allocated, and PGE did as it was told. There is nothing nefarious about that.

---

attacks a series of straw men instead. In our petition, we pointed out some of OPUC's reasons that the Court of Appeals' opinion avoided addressing. (Petition at 13-14, 27-28.) The Court may note that Columbia Steel's brief also avoids them.

On the other hand, Columbia Steel's brief (at 7) grudgingly acknowledges that the 1972 Order expressly declared that a customer did not have the right to choose between the two utilities. (*Cf.* Petition at 5.) Columbia Steel also acknowledges (at 7) this would have constituted illegal discrimination in the eyes of OPUC. Yet it offers no explanation why it was entitled to treble damages for being denied the same unlawful discriminatory treatment.

5 But having a reasonable belief that the 1972 Order suppressed competition means that PGE's actions were prompted by that belief, and by a desire to obey the law, rather than by a supposed illegal conspiracy in restraint of trade. On that issue PGE was at least entitled to a trial. *See infra* at 10.

II. Columbia Steel's legal arguments are in error

The issues for this Court are legal, not factual. What is more, they are issues of federal law, not Oregon law. As to the issues of federal law, there are several significant errors in Columbia Steel's brief.

1. The Court of Appeals' amendment to the "clear articulation" requirement is in error.

Columbia Steel would defend the Court of Appeals' new amendment to the state action doctrine by characterizing the Oregon statute as "not self-effectuating." (Columbia Steel brief at 13.) That is, the Oregon statute requires a state administrative agency---OPUC---to approve the restraint on competition in a particular case. According to Columbia Steel, that shifts the focus of the "clear articulation" test to the 1972 Order (and only the 1972 Order).

This won't withstand scrutiny. The Oregon allocation statute is like most other statutes in state action cases, in that the statute articulates a policy in favor of displacing competition, and designates a state agency to supervise the details.[6] It is therefore just like *Ticor*[7] and *Southern Motor Carriers*[8], where this Court treated what the agency does as a question of active supervision. After all, if the statute had *not* provided for state agency approval of the particular restraint--if it had been "self-effectuating," in Columbia Steel's

---

6 For example, the Oregon allocation statute is substantially identical in design to the North Carolina statute in *Southern Motor Carriers*, N.C. Gen. Stat. § 62-152.1(b).

7 *F.T.C. v. Ticor Title Insurance Co.*, 504 U.S. 389 (1992).

8 *Southern Motor Carriers Rate Conference v. U.S.*, 471 U.S. 48 (1985).

phrase---it would have failed the state action test for lack of active supervision. That was precisely what happened in *Patrick v. Burget,* 486 U.S. 94, 100 (1988). That *this* Oregon statute (unlike the Oregon statute in *Patrick*) requires a state agency to approve the particular restraint means that *this* restraint can pass the active supervision test (unlike the restraint in *Patrick).* It does not mean, as Columbia Steel would have it, that the focus of the clear articulation requirement somehow shifts from the statute to the 1972 Order.

Why does this analytic question matter? Because this new version of the state action doctrine is a wedge by which the Court of Appeals created an opening to interfere in the state administrative process. If the Court of Appeals had simply asked: does OPUC actively supervise the market division in Portland?---the answer was plainly yes. The answer would still have been yes, even if the question had been: has OPUC clearly articulated that Portland has been allocated? But the new version of the clear articulation requirement led to a very different question: whether, in the opinion of the Court of Appeals, OPUC adequately dotted the i's and crossed the t's of *Oregon law* in the 1972 Order, so as to provide a sufficient justification under *Oregon law* for OPUC's active enforcement of the market division in Portland. By reformulating the state action doctrine in this way, the Court of Appeals invented a tool for rejecting the conclusions of state agencies and state courts about state law, thereby creating conflicting duties on parties who are subject to the state law, and forcing a party like PGE into a Catch-22. The danger this Court warned against in *Omni*[9] has now materialized and taken root.

---

9 *City of Columbia v. Omni Outdoor Advertising,* 499 U.S. 365, 370-72 (1991).

In this case, it put PGE in an impossible conflict between the opposite messages from OPUC and the federal court, and PGE made the choice to transfer Columbia Steel to PP&L to stop treble damages from accruing further. It is disingenuous for Columbia Steel to suggest that PGE thereby conceded the rightness of Columbia Steel's position. (Columbia Steel brief at 11.) The District Court had already refused to defer to OPUC (App. D). Events have proved that PGE and its counsel correctly understood this and other signals emanating from the District Court.

2. The issues were fully raised before the Court of Appeals.

Columbia Steel is flatly wrong in telling this Court that PGE did not adequately preserve its arguments below. (Columbia Steel brief at 15.) PGE made the same argument in its briefs to the Court of Appeals that it makes now about the proper application of the two prongs of the state action doctrine. (*See, e.g.*, PGE opening brief at 20-22; PGE answering brief at 11-12.) The Court of Appeals then invented this new addition to the state action doctrine, which PGE has challenged ever since the Court of Appeals first articulated it.

3. Columbia Steel confuses the issue of the state's "intent."

The Court of Appeals was confused about the issue of "intent," and Columbia Steel augments that confusion.

First, that the intent of the state *is* relevant transpires from Columbia Steel's own quotations from this Court's

precedents, which state the importance of the state's intent.[10] There is no question that OPUC is an arm of the state of Oregon, that it *intended* to suppress competition in Portland, and said so, long before Columbia Steel's cause of action supposedly arose.

Second, it *would* be irrelevant to inquire whether an OPUC official had some improper subjective intent for his or her action in suppressing competition in Portland. That is what was at stake in *Omni*, when this Court cautioned against probing of "intent." (*See* Columbia Steel brief at 13-14.) There is no such issue of subjective intent here.

4. Columbia Steel's argument is not supported by Areeda & Turner.

Columbia Steel invokes the authority of Professors Areeda and Turner for the proposition that the 1972 Order must itself pass the "clear articulation" test. (Columbia Steel brief at 14 n. 11.) The quotation from their text, however, is aimed at conduct that is "not intended by the state." PGE's conduct was certainly intended by OPUC and clearly articulated by OPUC, whether in the 1972 Order or not. The quotation also dates from 1978, before the crystallization of the state action doctrine into the two prong test of *Midcal*.[11] It is through that two prong test that the concerns articulated by Areeda and Turner have since been addressed.

---

10 *See, e.g.*, Columbia Steel's quotations from *Ticor* at 15-17 of its brief.

11 *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

5. The Court of Appeals failed to give full faith and credit to the state adjudication.

The issue in the federal antitrust claim was the state action defense: whether the state had acted to require PGE to treat Portland as an allocated territory. The issue decided in the state adjudication was that the state had imposed that requirement. The judgment below cannot stand without doing violence to the state adjudication. As things stand now, a final state judgment holds that competition in Portland was unlawful under Oregon law after 1972, while a federal judgment holds the opposite.

6. The decision below is in conflict with *Praxair*.

Columbia Steel's purported distinction of *Praxair*[12] is transparently inadequate. In both cases, the question was whether the state agency had made an adequate allocation of the particular territory in question. The Eleventh Circuit held that the District Court erred in not considering conduct after the issuance of the order. That is manifestly the holding of the case, not dicta as Columbia Steel would have it. (Compare PGE's petition at 24 with Columbia Steel's brief at 21.)

III. These issues arise often and are of the greatest importance.

It is because deregulation of the electric utility industry is taking place that the decision below becomes even more important. It is understood throughout the government

---

12 *Praxair, Inc. v. Florida Power & Light Co.*, 64 F.3d 609 (11th Cir. 1995), cert. denied, __ U.S. __, 116 S. Ct. 1678, 134 L.Ed. 2d 781 (May 13, 1996).

and industry that part of the utility business must remain a legal monopoly---the transmission of electricity to end users--while another part will become competitive. Over the next decades, there will be many orders of many state commissions attempting to explain how the utilities must compete, and how they must not. These orders should not be vulnerable to the kind of punitive second-guessing of state action engaged in by the Court of Appeals.

The issue also transcends the utility industry. The error of the Court of Appeals can undermine state control of state administrative process in any area.

IV. PGE was deprived of a trial.

PGE does not here dispute whether the trial of which it was deprived should have been a jury trial. The unfairness is that PGE was allowed no trial at all, and was instead determined by summary judgment to have been an illegal conspirator because it obeyed state orders.

Respectfully submitted,

Barbee B. Lyon
Counsel of Record
TONKON, TORP, GALEN,
MARMADUKE & BOOTH
1600 Pioneer Tower
888 SW Fifth Avenue
Portland, OR 97204-2099
(503) 221-1440
Attorneys for Petitioner
Filed August 25, 1997

SUPPLEMENTARY APPENDIX TO
PETITIONER'S REPLY

(Table of Contents of one of Columbia Steel's briefs in state court)

In the Circuit Court of the State of Oregon
For the County of Marion

COLUMBIA STEEL CASTING CO., INC.,	)	Case No. 92C 12005
Plaintiff,	)	COLUMBIA STEEL CASTING CO. INC.'S MEMORANDUM IN OPPOSITION TO PUBLIC UTILITY COMMISSION OF OREGON'S MOTION FOR SUMMARY JUDGMENT
vs.	)	
PUBLIC UTILITY COMMISSION OF OREGON,	)	
Defendant.	)	

TABLE OF CONTENTS

	Page
Preliminary Statement	1
Background	2
I. THE COMMISSION HAD NO AUTHORITY TO "CORRECT ORDER NO. 72-870 NUNC PRO TUNC, OR OTHERWISE INTERPRET THE ORDER, AND THE 1992 ORDERS SHOULD BE VACATED INSOFAR AS THEY PURPORT TO DO SO	8
A. The Commission May Not Employ the Nunc Pro Tunc Procedure Twenty Years After the Fact to Substitute Its Judgment for the Commission's 1972 Judgment	8

B. The Legislature Has Not Granted the Commission the Power to "Interpret" or "Confirm" Twenty-Year Old Orders 13

1. ORS 756.040 does not support issuance of the 1992 Orders 14

2. ORS 756.515 does not support issuance of the 1992 Orders 17

3. The additional statutes now advanced by the Commission also do not support issuance of the 1992 Orders 18

C. The Commission Should Not Commence a Practice of Issuing Orders Interpreting Other Orders 20

D. The Commission Cannot Both Assert the Power to Make Findings Concerning the Intent of Prior Commissions and Claim That the Testimony of Former Commission Representatives Is Irrelevant, Immaterial and Privileged 22

II. THE COMMISSION DENIED COLUMBIA STEEL DUE PROCESS OF LAW, AND COLUMBIA STEEL IS ENTITLED TO DISCOVERY TO COLLECT EVIDENCE TO SUPPORT THIS CLAIM 25

A. This Was a Contested Case 26

B. The Procedural Rights Afforded by the Commission Were Inadequate 27

C. Columbia Steel Never Elected "Limited Participation" Destroying its Rights to Due Process of Law 28

D. Columbia Steel Never Waived any Right to a Hearing 31

E. The Commission's Review of the Petition for Reconsideration Is no Substitute for a Hearing 34

F. Columbia Steel Properly Sought Discovery in this Court to Demonstrate the Procedural Irregularities that Marred the Commission Proceedings 35

III. THE COMMISSION'S ORDERS ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE—INDEED, THE EVIDENCE COMPELS THE CONCLUSION THAT THE COMMISSION WAS ABSOLUTELY WRONG 38

A. The Limited Evidence Columbia Steel Submitted with the Petition for Rehearing Demonstrates That Order No. 72-870 Did Not Constitute an Exclusive Allocation of Service Territory 39

1. Before the 1972 Facilities Exchange, PGE and PP&L knew through painful experience that they could not secure any allocation of service territory In the City of Portland 40

2. PGE and PP&L did not ask the Commission to allocate territories in 1972, and did not receive any allocation 45

3. After Order No. 72-870, all parties continued to recognize that there was no exclusive allocation of service territory in Portland 50

B. Absent a Finding that Order No. 72-970 Was Intended to Allocate Territory in Portland, The Commission Has No Remaining Basis for its 1992 Orders 53

Conclusion 55

(8)

Supreme Court, U.S.
FILED
APR 27 1998
CLERK

No. 97-49

In The

Supreme Court of the United States

October Term, 1997

PORTLAND GENERAL ELECTRIC COMPANY,
Petitioner,

v.

COLUMBIA STEEL CASTING CO., INC.,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITIONER'S RESPONSE TO THE SOLICITOR GENERAL'S BRIEF

Barbee B. Lyon
Counsel of Record
Scott G. Seidman
TONKON TORP LLP
1600 Pioneer Tower
888 S.W. Fifth Avenue
Portland, Oregon 97204
Telephone: (503) 221-1440

Carter G. Phillips
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
Telephone: (202) 736-8000

Attorneys For Petitioner

Filed April 27, 1998

13 pp

PARTIES TO THE PROCEEDING

There have been no changes to the list of parties reported in PGE's previous brief.

TABLE OF CONTENTS

INTRODUCTION 1

1. The Government's version of the state action doctrine is in conflict with the principles of federalism 2

2. The Government is arguing the position that this Court rejected in *Southern Motor Carriers*. 4

3. The Government's position does not accord full faith and credit to the prior state judgment 5

4. The Government cannot reconcile the conflict between the Ninth Circuit and the Eleventh Circuit 7

5. The Government cannot reconcile the conflict between the Ninth Circuit and the Tenth Circuit 9

6. The Court should grant the petition. 10

TABLE OF AUTHORITIES
FEDERAL CASES

City Of Columbia v. Omni Outdoor Advertising, 499 U.S. 365, 370-72 (1991) 3

Lease Lights v. Public Service Co. Of Oklahoma, 849 F.2d 1330 (10th Cir. 1998), cert. denied, 488 U.S. 1019 (1989) 9

NYNEX Corp. v. Discon, Inc., No. 96-1570, cert. granted, March 23, 1998 1

Praxair, Inc. v. Florida Power & Light Co., 64 F.3d 609 (11th Cir. 1995), cert. denied, 517 U.S. 1190 (1996) 1, 7, 8

Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48 (1985) 4

INTRODUCTION

Since at least 1980, the Solicitor General has consistently opposed the state action doctrine on behalf of the United States. During that time, this Court has frequently rebuffed the Government's position in order to defend the interests of federalism and the authority of the states to implement their policies. This Court's decisions have been plain that this was the manifest intent of Congress.

It is thus not surprising that the Solicitor General has urged the court to decline review in this case in which the state action doctrine has received a crabbed interpretation, and the state policy with respect to the delivery and pricing of electricity is thwarted. As far as we can tell, the Solicitor General has never yet found the state action defense to be meritorious in any case in this Court. As far as we can tell, the Solicitor General's recommendations are consistently against certiorari whenever the state action defense was rejected below, and consistently in favor of certiorari whenever it prevailed below.

The steadfast nature of the Solicitor General's support for any decision that undermines the state action doctrine is revealed in the contrived effort to wish away the plain doctrinal conflict between the decision below and the Eleventh Circuit's holding in *Praxair* discussed within. The skepticism that this Court showed by granting certiorari in another case last month in spite of the Solicitor General's negative recommendation is appropriate here as well. (*NYNEX Corp. v. Discon, Inc.*, No. 96-1570 (cert. granted March 23, 1998)). The Court should grant this petition and allow the Solicitor General to defend the judgment below on the merits, rather than ignoring the conflict between the circuits that has significant implications for federalism.

1. The Government's version of the state action doctrine is in conflict with the principles of federalism.

A quick way to see what is wrong with the Government's position is to begin with the following passage from its brief. The Government summarizes and approves the decision below as follows:

> "The PUC did not specifically and clearly authorize *by the relevant statutory process* a division of the Portland market into exclusively served territories."

(Solicitor General's brief at 11, emphasis added, internal punctuation omitted.)

The italicized words are the key. They are what the Ninth Circuit---and now the Government---have grafted on to the state action doctrine. They are the vehicle by which the Ninth Circuit and the Government would trespass on state authority.

The *"relevant statutory process"* that they refer to is a *state* statutory process, not a federal one. The Ninth Circuit and the Government here insist that it is the role of a *federal* court to review the action of a *state* agency to determine that a *state* agency is not in sufficient compliance with *state* statutory procedure---even if the *state* courts have already come to the opposite conclusion.

Our case hinges on the addition of these italicized words to the state action doctrine. Omit them, and the case comes out the opposite way. For whether or not the PUC sufficiently observed *"the relevant statutory process"* when it divided the Portland market, it *did* divide it nevertheless, and it has been actively enforcing that division for nearly 20 years. That is beyond dispute. The District Court made an explicit finding that "the OPUC has acted to prevent PGE"

from competing, while nevertheless imposing treble damages on PGE for submitting to the OPUC. (Petition at 11.) There is a final state judgment between these same parties that so holds. (App. M-20; O-2; P-1, 2.) Columbia Steel alleged the same thing in the complaint itself, and all the parties admitted it was true. (Petition at 19; Petitioner's Reply at 1, text at n.1.) Columbia Steel even demanded an injunction to make the OPUC *stop* enforcing its division of the Portland market.[1] (*Id.*)

For the Government, however, it is irrelevant that it was actually the OPUC who was dividing the market, and who was telling PGE what to do. For the Government, the question instead is whether the OPUC, in telling PGE what to do, was complying with *"the relevant statutory process"*--- *i.e.*, with the *Oregon* statutory process. And for the Government, that is a job for the *federal* court. The Government therefore endorses the view, disapproved by this Court, that would make the federal court the reviewer of *state* activity

> whenever it is alleged that the governmental body, though possessing the power to engage in the challenged conduct, has actually exercised its power in a manner not authorized by state law.

City of Columbia v. Omni Outdoor Advertising, 499 U.S. 365, 370-72 (1991).

---

[1] In other words, Columbia Steel asked the federal court to suppress state action because it didn't qualify as "state action".

2. The Government is arguing the position that this Court rejected in *Southern Motor Carriers.*

The Government attempts to revive an argument that it lost when this Court decided *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985). In *Southern Motor Carriers,* the Government argued unsuccessfully that the first prong of the state action doctrine ---the "clear articulation" requirement---is not satisfied by state statutes that merely *permit* anticompetitive conduct, but do not *require* it.

In our case, the Government once again asserts that the "clear articulation" requirement is not satisfied by the Oregon statute, because it merely "permits" anticompetitive conduct. (Solicitor General's brief at 12.) The Government therefore would use that previously rejected distinction as an opening to invent a restrictive new addition to the state action doctrine. When statutes merely "permit" anticompetitive conduct, the federal courts must now subject the action of the state agency to a double test, under both prongs of the state action doctrine. It is not enough that the OPUC satisfies the second prong of "active supervision," *i.e.* that the OPUC has actively suppressed competition in the Portland market for two decades. The text of the original agency order must also be subjected to the federal court's "rigorous" test for clarity. It will fail that test upon any whiff of "ambiguity," notwithstanding the succeeding decades in which the state agency has emphatically made its will abundantly clear.

This transforms the "clear articulation" requirement into a shibboleth, divorced now from its original purpose of ascertaining the state's actual intent. As a shibboleth, it is a tool by which the federal courts can override intentional state action that they disapprove of. It becomes irrelevant in our case that the Oregon Legislature encouraged the allocation of markets, turned the supervision of the details over to the

OPUC, and that the OPUC then enforced the allocation of Portland throughout two decades. Instead, the Court of Appeals, with the encouragement of the Government, wields the "clear articulation" requirement to declare that the *words* that the OPUC first used 25 years ago don't suit their present "rigorous" standard for clarity, and therefore punishes PGE for submitting to what truly has been state action in any realistic sense of the phrase.

3. The Government's position does not accord full faith and credit to the prior state judgment.

Another principle of federalism is the full faith and credit that federal courts must grant to state decisions. Unfortunately, the Government appears indifferent in our case to this principle as well.

There is a final *state* court judgment, binding on all the parties to the present case, that the Portland market has been allocated and divided ever since 1972. (Petition at 26-29.) The Court of Appeals, not wishing to be bound by this prior state decision, chose to distort it. (*Id.*) The Government now follows suit.

The Government would have this Court think that the prior state decision does little more than acknowledge that there was "perhaps" an ambiguity in the 1972 Order. Yet the Government remains determinedly silent, like the Court of Appeals, about what is actually held in that prior state decision. In particular, that prior decision holds:

(1) that the 1972 Order made the statutory findings required by the allocation statute; and

(2) that such findings, "without more," automatically effectuate the allocation of

> the market "by operation of [state] law."[2] (App. M-18; *see also* M-1, N-2-3; O-1, 2; P-1-2.)

There exists therefore a prior state judgment that Portland had been allocated by means of the state "*relevant statutory process*" that the Government and the Court of Appeals purport to champion---but whose prior interpretation in the state judgment between the same parties they refuse to honor.

When a Court of Appeals refuses to be bound by the full faith and credit requirement, it need not say so directly: it need only ignore the inconvenient words of the state decision, and distort the remainder. We submit that by itself this is reason enough to grant certiorari in our case: only this Court can enforce on the Courts of Appeals the duty to acknowledge fairly what was actually said and decided by the state forum.

The state forum declared of the 1972 Order that "there was no doubt as to its substance" in allocating Portland. (App. M-18, N-3, O-2, P-1,2.) PGE was therefore correct in understanding that binding order and in complying with state enforcement of that order, while the federal court declares that PGE's correct understanding and obedience to its duty under state law must be penalized with treble damages. The Government is regrettably indifferent to the injustice, to say nothing of the havoc wreaked upon the principles of federalism, of inflicting treble damages on PGE

---

[2] This was the same explanation that the Oregon Department of Justice gave PGE, on behalf of the PUC, as to why PGE could not do what Columbia Steel demanded. (App. U-2, 3.) PGE thereafter told Columbia Steel that it would not comply with its demand. (App. F-10, 11.) According to the District Court, this triggered PGE's treble damage liability. (App. F-22.)

under *federal* law for having correctly understood and obeyed valid *state* law.

4. The Government cannot reconcile the conflict between the Ninth Circuit and the Eleventh Circuit.

The Government's attempt to reconcile the decision below with the Eleventh Circuit's conflicting decision in *Praxair* is not only insufficient, but halfhearted to boot. *Praxair, Inc. v. Florida Power & Light Co.*, 64 F.3d 609 (11th Cir. 1995), cert. denied, 517 U.S. 1190 (1996).

The Government first toys with an irrelevant distinction---a distinction that the Court of Appeals appears to have relied upon (App. A-15 n. 8)---but then concedes that its validity is not "probable." (Solicitor General brief at 15, last lines.) Instead, the Government is reduced to supposing that the *evidence* must have been stronger in the Florida case. (Solicitor General's brief at 15-16.) The Government declares that both our case and *Praxair* are "close cases" on their facts, and that our case presents merely a "factbound" question of no interest to this Court. (Solicitor General's brief at 8, 11 n. 5.)

This is nonsense. Both our case and *Praxair* were decided by summary judgment. Cases that are "close cases" on their facts aren't decided by summary judgment. In order to shoehorn our case into the "factbound" rubbish bin, the Government would have this Court suppose that *both* the Eleventh Circuit and the Ninth Circuit so far forgot the basic rules of summary judgment that they weighed the evidence in each respective case as if they were sitting as juries, and that the Eleventh Circuit must have found that the evidence in the "close case" that it decided was "substantially stronger" than the evidence in the "close case" before the Ninth Circuit. (Solicitor General's brief at 16.).

The Government's conjecture about the relative strength of the evidence rests on nothing more than the *ipse dixit* of the Solicitor General. It is a transparent attempt to avoid conceding the obvious: that these two summary judgments came out opposite because the two circuits applied conflicting principles of law, and that the Government cannot think of a single distinction between the two cases other than inventing this *ipse dixit* notion about the supposed "strength of the evidence." And for that matter, on what basis can the Government make a representation to this Court that the "maps" in the Florida case were "substantially stronger" evidence than, say, OPUC's 20 year pattern of suppressing competition in our case? (Solicitor General's brief at 16.)

It is manifest that the two circuits did apply conflicting principles of law. The Eleventh Circuit overruled the Florida district court for doing precisely what the Ninth Circuit did, *i.e.* restricting itself to an analysis of the Florida Commission's original order. *Praxair* at 612. The Eleventh Circuit did not ask, as did the Ninth Circuit and now the Government, whether the Florida Commission had complied with the "relevant statutory process" in its original 1965 Order. The Eleventh Circuit did not test the original Florida Commission Order by the "rigorous" standard of "clarity" which the Ninth Circuit and the Government now champion. Indeed, the Eleventh Circuit did not view it as a "clear articulation" issue at all, but rather as a second prong issue of "active supervision." *Praxair* at 611-612.

The Eleventh Circuit sought the state's intent. The Ninth Circuit disclaimed any interest in the state's intent, and cared only whether the 1972 Order contained the right statutory citation and the magic word "exclusive."

The Ninth Circuit's approach should be rejected. The issue is important precisely because this is a conflict between state authority and federal authority. The Eleventh Circuit's approach was designed to make certain that the federal court

did not interfere with actual state action and intent. The Ninth Circuit's approach is indifferent about actual state action and intent, and is careless about inflicting chaos into the intricate process of state agency supervision of a public utility.

5. The Government cannot reconcile the conflict between the Ninth Circuit and the Tenth Circuit.

Even if the OPUC and the state courts were wrong about state law, and even if a federal court can ignore their interpretation of state law, the state action defense should still apply in accordance with the contrary holding of the Tenth Circuit in *Lease Lights v. Public Service Co. of Oklahoma*, 849 F.2d 1330 (10th Cir. 1998), cert. denied, 488 U.S. 1019 (1989). That is because the OPUC's enforcement of its interpretation of its own order bore at least "the appearance of legality." *Lease Lights* at 1334. Right or wrong, the OPUC's instructions still constituted *state* action instead of a private conspiracy. The Government, however, declares that a utility cannot rely on what the OPUC says, and must seek further rulings. (Solicitor General's brief at 16 n 8.) Yet the Tenth Circuit held the opposite, relying on Professors Areeda and Hovencamp, and declared that a utility does *not* have to challenge what the agency says. (Petition at 25.)

Furthermore, when this dispute arose, PGE *did* seek a clarifying ruling from the OPUC. Yet the federal courts below refused to honor the jurisdiction of the OPUC to interpret its own orders, and treated the OPUC as merely another litigant in federal court. (Petition at 9; App. D-7, 8.)

The Ninth Circuit and the Tenth Circuit therefore remain in conflict about whether the state action defense protects a utility who in good faith (App. F-18) complies with the arguably mistaken instructions of its state regulatory agency.

6. The Court should grant the petition.

For these and the other reasons previously stated, this Court should grant the petition.

Respectfully submitted,

Barbee B. Lyon
Counsel of Record
Scott G. Seidman
TONKON TORP LLP
1600 Pioneer Tower
888 S.W. Fifth Avenue
Portland, OR 97204
(503) 221-1440

Carter G. Phillips
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Attorneys for Petitioner
Filed April 27, 1998

Supreme Court, U.S.
FILED
APR 30 1998
OFFICE OF THE CLERK

(9)

No. 97-49

In The

SUPREME COURT OF THE UNITED STATES
October Term, 1997

PORTLAND GENERAL ELECTRIC COMPANY,

Petitioner,

v.

COLUMBIA STEEL CASTING CO., INC.

Respondent.

On Petition For Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

RESPONDENT'S SUPPLEMENTAL BRIEF ON ISSUES RAISED IN PETITIONER'S RESPONSE TO THE SOLICITOR GENERAL'S BRIEF

Michael C. Dotten
Counsel of Record
Eric R. Todderud
Michael A. Stosser
HELLER, EHRMAN, WHITE
& McAULIFFE
Suite 1750, 200 S.W. Market Street
Portland, OR 97201-5718
Telephone: (503) 227-7400
Facsimile: (503) 241-0950
Attorneys for Respondent

Filed April 29, 1998

13 pp

Parties To The Proceeding

There have been no changes to the list of parties reported in Columbia Steel Casting Co., Inc.'s previous brief.

TABLE OF CONTENTS

Page

INTRODUCTION.....1

ARGUMENT.....2

CONCLUSION.....8

TABLE OF AUTHORITIES

Page

CASES

California Retail Liquor Dealers Assn v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) 2, 4, 5

Federal Trade Commn v. Ticor Title Ins. Co., 504 U.S. 621 (1992) 1

Southern Motor Carriers Rate Conf., Inc. v. United States, 471 U.S. 48 (1985) 4

STATUTES

Or. Rev. Stat. § 758.450(1) 2

Introduction

The arguments in Petitioner's Response to the Solicitor General's Brief twist the state action doctrine and ignore twenty years of decisions applying that doctrine. The state action doctrine applies only when anticompetitive conduct truly is part of "a deliberate and intended state policy," rather than mere inadvertence on the part of the state. *Federal Trade Comm'n v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992). Under the ruse of "federalism," Petitioner urges this Court to adopt a standard for state action immunity that is indifferent as to whether monopolists truly are acting pursuant to state policy. The Court should decline the Petition.

Much of Petitioner's Response reasserts arguments raised in prior briefing. Respondent will not address those arguments specifically but, instead, will

rely on its briefs in this matter. Petitioner's federalism arguments, however, are particularly misleading and warrant a response.

As the United States as Amicus Curiae makes clear, the court below faithfully followed this Court's decisions interpreting the state action doctrine. This case presents no occasion to develop a new standard for state action immunity.

Argument

Petitioner's emphasis on federalism is misplaced. This is an antitrust case involving the state action doctrine. The lower court correctly applied the governing standard of *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), addressing whether the Petitioner's monopoly was part of a clearly articulated and affirmatively expressed state

policy. That standard balances the need for vigorous antitrust enforcement against principles of federalism.

The application of the *Midcal* standard, as advocated by the United States, does not interfere with Oregon law. The Oregon legislature has enacted a clear statutory scheme. Under Oregon law, exclusive service territories for utilities are permissible only when the Oregon Public Utility Commission (OPUC) approves an application for an exclusive service territory. Or. Rev. Stat. § 758.450(1) ("Territory served by more than one person providing similar utility service may only become an allocated territory by a contract approved by the Public Utility Commission."). Thus, Petitioner's conduct will satisfy the *Midcal* standard only if the OPUC clearly articulated and affirmatively expressed a policy to displace competition with allocated exclusive

service territories in Portland. The Ninth Circuit correctly found that the OPUC never approved a territorial allocation for Petitioner in Portland.

To support its federalism argument, Petitioner isolates one passage of the United States' brief. That passage in turn quotes the opinion on rehearing of the Ninth Circuit Court of Appeals, referring to "the relevant statutory process." The requirement of OPUC approval of territorial allocations — the relevant statutory process — is a key part of the state policy at issue here. In determining whether a private actor's monopolization is part of state policy, the Court cannot overlook Oregon's legislative policy that all monopolies are subject to OPUC review and approval through the established statutory process.

Principles of federalism are respected in the decisions below. This is not a case of a federal court reviewing compliance with state law, as Petitioner argues. Instead, the courts below properly focused on whether the state, through the OPUC, clearly and affirmatively sanctioned the anticompetitive conduct. Because it did not, the state action doctrine does not apply.

Petitioner is simply wrong on the facts in suggesting that the OPUC prohibited competition for electric service in Portland. But Petitioner's erroneous factual characterizations are of no significance. The facts as characterized by Petitioner do not demonstrate a clearly articulated and affirmatively expressed state policy to permit the monopolization at issue here.

Permitting immunity based on any standard short of clear articulation and affirmative expression, as Petitioner urges, would seriously weaken the function of the *Midcal* test to ensure that private anticompetitive conduct truly is part of a state regulatory policy. In addition, weakening the first leg of the *Midcal* standard would invite scrutiny into the intent of state policy makers, a process that the clear standards in *Midcal* were intended to avoid.

Southern Motor Carriers Rate Conf., Inc. v. United States, 471 U.S. 48 (1985), does not bolster Petitioner's federalism claim. Contrary to Petitioner's assertions, the United States does not argue that state policy must require, rather than permit, anticompetitive conduct. The United States has not argued that the Oregon statutes must compel the anticompetitive

conduct. Petitioner merely advances that fallacy to gloss over the fact that the "clear articulation" leg of the *Midcal* test was not met in the OPUC's order. As noted above, Oregon has not adopted a policy of permitting monopolization throughout the state. The legislature has delegated the determination of whether to permit monopolization to the OPUC, to be made on a case by case basis. The first leg of the Midcal test can be effectuated only by examining whether the OPUC clearly articulated and affirmatively expressed permission for the monopolistic conduct at issue in this case. As the Solicitor General and the Ninth Circuit correctly point out, the OPUC had its own doubts about the clarity of its 1972 Order. Brief for the United States as *Amicus Curiae*, at 18. These doubts are not surprising because the OPUC's own lawyer (and the next

Commissioner) filed an affidavit in the district court indicating that the 1972 OPUC Order was not intended to create exclusive territories.

The Solicitor General is not advocating federal-court review of state regulatory activity. To the contrary, the Solicitor General is urging adherence to the standard that always has been the foundation of this Court's state action analysis: For immunity to apply, the state must clearly articulate and affirmatively express its sanction of the particular anticompetitive conduct at issue. Under the unique facts of this case, that standard has not been met.

Conclusion

The positions taken by the United States are neither novel nor controversial. The United States simply argues that the appropriate standard in this case is

the *Midcal* test, as it has been applied in numerous other cases. Because the court below properly applied that test, and because the result is in large part dependent on the unique facts of this case, there is no reason to grant Certiorari.

Respectfully submitted,

Michael C. Dotten
Counsel of Record
Eric R. Todderud
Michael A. Stosser
HELLER, EHRMAN, WHITE
& McAULIFFE
200 S.W. Market Street, Suite 1750
Portland, OR 97201-5718
Telephone: (503) 227-7400
Facsimile: (503) 241-0950
Attorneys for Respondent

Supreme Court, U.S.
FILED
APR 14 1998
CLERK

No. 97-49

In the Supreme Court of the United States

OCTOBER TERM, 1997

PORTLAND GENERAL ELECTRIC COMPANY, PETITIONER

v.

COLUMBIA STEEL CASTING CO., INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

SETH P. WAXMAN
Solicitor General
Counsel of Record

JOEL I. KLEIN
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

A. DOUGLAS MELAMED
Deputy Assistant Attorney General

EDWARD C. DUMONT
Assistant to the Solicitor General

ROBERT B. NICHOLSON
DAVID SEIDMAN
Attorneys

Department of Justice
Washington, DC 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

Whether the court of appeals (i) articulated the proper test for "state action" immunity from the federal antitrust laws and (ii) correctly applied that test to the facts of this case.

TABLE OF CONTENTS

	Page
Statement	1
Discussion	7
Conclusion	19

TABLE OF AUTHORITIES

Cases:

American Can Co. v. *Davis*, 559 P.2d 898 (Or. Ct. App.), rev. denied, 278 Or. 393 (1977)	18, 19
California Retail Liquor Dealers Ass'n v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980)	8
City of Columbia v. *Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991)	12, 13, 16
City of Lafayette v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978)	8-9
FTC v. *Ticor Title Ins. Co.*, 504 U.S. 621 (1992)	8, 9, 10, 13
General Motors Corp. v. *Romein*, 503 U.S. 181 (1992)	18
Lease Lights, Inc. v. *Public Service Co. of Okla.*, 849 F.2d 1330 (10th Cir. 1988), cert. denied, 488 U.S. 1019 (1989)	16
Parker v. *Brown*, 317 U.S. 341 (1943)	8
Patrick v. *Burget*, 486 U.S. 94 (1988)	7, 8, 10
Praxair, Inc. v. *Florida Power & Light Co.*, 64 F.3d 609 (11th Cir. 1955), cert. denied, 116 U.S. 1678 (1996)	14, 15, 16
Southern Motor Carriers Rate Conference, Inc. v. *United States*, 471 U.S. 48 (1985)	8, 13
Town of Hallie v. *City of Eau Clair*, 471 U.S. 34 (1985)	8, 9, 12, 13, 18

Statutes: Page

Sherman Act, 15 U.S.C. 1-2 ..... 4, 5
Or. Rev. Stat. (1984):
Ch. 757 ..... 1, 2
§ 757.480 1
Ch. 758 ..... 1, 4, 5
§ 758.410(1) 2
§ 758.410(2) 2
§ 758.415 2
§ 758.450(2) 2

Miscellaneous:

Inman & Rubinfield, *Making Sense of the Antitrust State-Action Doctrine: Balancing Political Participation and Economic Efficiency in Regulatory Federalism*, 75 Tex. L. Rev. 1203 (1997) 9

In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-49

PORTLAND GENERAL ELECTRIC COMPANY, PETITIONER

v.

COLUMBIA STEEL CASTING CO., INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Chapter 757 of the Oregon Revised Statutes provides, among other things, that a public utility may not dispose of any material amount of the property used in its public service functions without first obtaining the approval of the Oregon Public Utility Commission (the PUC). Or. Rev. Stat. § 757.480 (1989), *reprinted at* Pet. App. R1-R2. Chapter 758 defines a specific statutory scheme under which two or more utilities may contract with each other, subject to approval by the PUC, "for the purpose of allocating territories and customers between the parties and

designating which territories and customers are to be served by which of said contracting parties." Pet. App. R3 (§ 758.410(1)). If the PUC finds that the contract will advance specified public interests and approves it, the contract becomes "valid and enforceable," and no other utility may provide service in any territory that has been allocated to one of the contracting parties. *Id.* at R4, R7 (§§ 758.415, 758.450(2)). The contract may also provide for the sale or exchange of equipment or facilities in allocated areas, but any such transfer remains subject to the separate approval requirements of Chapter 757. *Id.* at R3-R4 (§ 758.410(2)).

2. Before 1972, petitioner Portland General Electric Company and another utility, Pacific Power & Light (PP&L), competed to provide electricity to customers throughout the city of Portland, Oregon. Pet. App. A6. The two utilities maintained duplicative transmission lines, poles, substations and transformers throughout the city. *Ibid.* In 1972, petitioner and PP&L submitted to the Portland City Council a plan to create exclusive service territories within the city, thereby eliminating both duplication of facilities and competition for customers. *Id.* at A6. The City Council, which had previously opposed efforts to eliminate utility competition, disapproved that plan. *Ibid.* The Council endorsed, however, an exchange of property between the two utilities to reduce or eliminate the duplication of facilities, while reiterating that "both companies operate under non-exclusive franchises and * * * the obligation to supply properties within the City must remain binding upon both companies." *Id.* at A6 & n.3 (court's emphasis omitted).

Petitioner and PP&L thereafter entered into an agreement (the Agreement) to "comply" with the city council's decision and "to provide for the elimination of duplicating electric facilities" within the city. Pet. App. A7. That Agreement "said nothing about exclusive service territories in Portland," but it provided for an exchange of properties and customer accounts that would, in effect, create separate territories, in each of which a single utility owned all the facilities and served all the customers. *Id.* at A7-A9. The utilities then applied for, and received, an order from the PUC approving "the transfer and exchange of property, facilities and customers" covered by the Agreement. *Id.* at J1-J13, J10. Neither the utilities' application to the PUC (Resp. Br. in Opp. App. A1-A27) nor the Commission's 1972 order referred specifically to the creation of exclusive service territories in Portland, or mentioned the provisions of state law providing for PUC approval of agreements for the allocation of exclusive territories. See Pet. App. A10, M7, M14-M17; Resp. Br. in Opp. App. A1. After implementation of the 1972 Agreement, however, petitioner and PP&L ceased competing with each other in Portland. See, *e.g.*, Pet. App. A11, A20-A21, L-2, M21.

3. Respondent Columbia Steel Casting Co. operates a plant in an area of Portland that petitioner began serving exclusively after issuance of the PUC's 1972 order. Pet. App. A11. In 1987, respondent sought to purchase its electricity from PP&L instead, because PP&L's rates were lower than petitioner's. *Ibid.* PP&L refused, on the ground that respondent's plant, although crossed by a PP&L transmission line, was in an area served exclusively by PG&E. *Id.* at A11, D3. In 1989, PP&L agreed to provide electricity to respondent, but petitioner

objected on the ground that the 1972 Agreement gave it the exclusive right to supply electricity to any customer at that location. *Id.* at A11, E8.

Respondent sued petitioner, PP&L, and the PUC, seeking a declaration that petitioner had no exclusive right to provide electricity to respondent's plant, and that any agreement to the contrary violated the Sherman Act, 15 U.S.C. 1-2. Pet. App. A4-A5, E8. Petitioner defended on the ground that the PUC's 1972 order had allocated exclusive territories to it and to PP&L, and that the arrangement was immune from antitrust liability under the state-action doctrine. *Id.* at A5.

The district court rejected petitioner's state-action defense. Pet. App. E1-E18. The court acknowledged (*id.* at E15) that a territorial allocation agreement that was explicitly approved by the PUC under Chapter 758 would be protected by state-action immunity. The court concluded, however, that the 1972 contract between petitioner and PP&L reflected only an agreement "to an exchange of facilities," and "was not a contract whereby the parties allocated territories and customers * * * and limited their rights to operate within the [allocated] parcels in the future." *Id.* at E17. The 1972 PUC order, which was based on the utilities' contract, therefore "did not order the allocation of territories and customers and did not designate which territory was to be served by which contracting party." *Ibid.* Because "[i]t would be contrary to the purpose of the doctrine of state action to allow private parties to claim monopolies that have not been specifically and clearly authorized by relevant statutory process," the court rejected petitioner's reliance on the 1972 order to preclude antitrust liability. *Id.* at E17-E18.

Shortly after Columbia Steel filed this action, petitioner filed an application with the PUC seeking, among other things, a declaration that the 1972 order had created exclusive service territories in Portland. Pet. App. M3. In 1992, after the district court had rejected petitioner's state-action defense, the PUC issued an opinion (*id.* at M1-M35) acknowledging that the 1972 order "perhaps * * * did not unambiguously allocate exclusive service territories" to petitioner and PP&L (*id.* at M23), but concluding that there was "much extrinsic evidence that the Commission and the parties intended a territorial allocation" (*id.* at M20). The Commission accordingly entered an order "correct[ing]" its 1972 order, "nunc pro tunc," by inserting operative language that specifically refers to "separat[ing] service territories" and cites a relevant provision of Chapter 758. *Id.* at M30-M33. At the same time, noting that the effect of events in 1972 was "still being litigated in other forums," and "[t]o resolve any future ambiguity," the PUC specifically approved a 1991 agreement between petitioner and PP&L that explicitly allocated service territories to conform to the areas described in the 1972 Agreement, although with a new provision that allowed Columbia Steel to receive its service from PP&L rather than from petitioner. *Id.* at M27-M30.

The district court declined to alter its judgment on petitioner's state-action defense in light of the PUC's 1992 order. See Pet. App. F15, F17-F18, G1-G3. After resolving various subsidiary issues, the court entered judgment against petitioner under Section 1 of the Sherman Act, and awarded damages and attorney's fees. *Id.* at F22-F23, H1-H5, I1-I3.

4. The court of appeals initially reversed. Pet. App. C1-C19. Although it acknowledged that the 1972

order was "not particularly clear regarding the PUC's intention to permit a permanent division of the Portland market" (*id.* at C12), the court interpreted its prior cases to hold that this Court's "clear articulation" test for state-action immunity was not a "clear statement rule" (*id.* at C9), but rather a "more liberal 'foreseeability' standard" (*id.* at C12), which "require[d] only that the anticompetitive conduct be sufficiently foreseeable to justify the inference that it was intended by the authorizing agency" (*id.* at C18). See *id.* at C7-C11. After an extended analysis of different possible interpretations (*id.* at C11-C18), the court concluded that the 1972 order was "sufficiently clear" (*id.* at C12) to satisfy that standard. See *id.* at C17-C18.

The United States filed a brief as amicus curiae in support of rehearing in the court of appeals. The government emphasized that its "concern [was] with the standard the panel [had] apparently adopted" (U.S. Reh'g Br. 12), which appeared to confuse the foreseeability of anticompetitive effects of authorized conduct with the foreseeability of anticompetitive conduct that had not, in fact, been clearly authorized by the State (see, *e.g.*, *id.* at 6-10). Because the court's opinion could be read to substitute "foreseeability" for "clear articulation" in a way that "dispense[d] with the requirement of express [state] authorization" as a prerequisite to immunity (*id.* at 9), the government urged that the court either amend its opinion to clarify that it "viewed the PUC orders preceding the challenged conduct, separately or taken together, as clearly authorizing de jure exclusive territories," or revisit its interpretation of the appropriate legal standard (*id.* at 12-13).

The court of appeals granted rehearing, vacated its prior decision, and affirmed the district court's judgment on liability under the Sherman Act.[1] Agreeing that it had "erred in allowing a foreseeability test to be substituted for the clear articulation test" established by this Court's cases (Pet. App. A27), the court concluded that the 1972 order "fail[ed] to speak with sufficient clarity to satisfy" the correct standard (*id.* at A15). Because the PUC did not, in the court's view, "clearly exercise its statutory authority to approve the allocation of exclusive service territories in Portland" (*id.* at A20), either in 1972 or in later orders entered before the present dispute arose (see *id.* at A20-A22), the court "agree[d] with the district court that the elimination of competition between [petitioner] and PP&L in Portland was not cloaked with state-action immunity" (*id.* at A22).[2]

DISCUSSION

This Court has established "a rigorous two-pronged test to determine whether anticompetitive conduct engaged in by private parties should be deemed state action and thus shielded from the antitrust laws." *Patrick* v. *Burget*, 486 U.S. 94, 100 (1988). Under the first prong of that test, private anticompetitive conduct must be authorized by the State in a way that is "clearly articulated and affirmatively expressed as state policy." *Ibid.* The

---

[1] The court vacated the district court's damage award and remanded for a recalculation of damages over a longer period of time. Pet. App. A35-A36.

[2] The court also rejected several other arguments raised by petitioner, including that the PUC's 1992 order, as affirmed by a state court, was entitled to preclusive effect in this case. Pet. App. A23-A35.

court of appeals' opinion on rehearing in this case properly construes that requirement, correcting the court's initial misunderstanding of established law. See Pet. App. A13, A15 n.8, A26-A29. The only remaining question therefore is whether the court applied the "clear articulation" test correctly to the facts of this case. That fact-bound determination does not, in our judgment, warrant review by this Court.

1. State-action immunity from the prohibitions of the Sherman Act protects not only "state action or official action directed by a state," *Parker* v. *Brown*, 317 U.S. 341, 351 (1943), but also private anticompetitive conduct that is "truly the product of state regulation" and therefore "fairly attributable to the State." *Patrick*, 486 U.S. at 100. As this Court has repeatedly held, however, private conduct cannot be "fairly attributed" to the State for these purposes unless each of two essential conditions is met: "First, the challenged restraint [on competition] must be one clearly articulated and affirmatively expressed as state policy; second, the policy must be actively supervised by the State itself." *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (internal quotation marks omitted); see also *FTC* v. *Ticor Title Ins. Co.*, 504 U.S. 621, 633 (1992); *Patrick*, 486 U.S. at 100; *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 471 U.S. 48, 57 (1985); compare *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34 (1985) (municipality need only establish clear articulation).

As the Court has explained, the nature of state-action immunity dictates that it should not be expansively construed. *Ticor*, 504 U.S. at 635-637 ("state-action immunity is disfavored, much as are repeals by implication"); see also *City of Lafayette* v. *Louisiana*

Power & Light Co., 435 U.S. 389, 398-399 (1978) (implied exclusions from the antitrust laws are disfavored because those laws embody "overarching and fundamental policies" through which Congress "sought to establish a regime of competition as the fundamental principle governing commerce in this country"). Strict observance of the clear articulation and active supervision requirements is necessary to ensure that private anticompetitive conduct will be immunized if, but only if, it may be fairly characterized as a derivative form of action by the State itself. "[I]nsistence on real compliance with both parts of the *Midcal* test" in fact "increase[s] the States' regulatory flexibility," because it permits them to "regulate their economies in many ways not inconsistent with the antitrust laws," without running the risk that they will inadvertently confer antitrust immunities "whenever they enter the realm of economic regulation." *Ticor*, 504 U.S. at 635-637. Similarly, strict application of the requirements for immunity helps to ensure both that "federal law [does not] compel a result that the States do not intend but for which they are held to account" and, conversely, that States "accept political responsibility * * * [when they] do choose to displace the free market with regulation." *Id.* at 636; cf. *Town of Hallie*, 471 U.S. at 45 n.9 (noting check that public scrutiny may provide against anticompetitive conduct by local governments).[3]

---

[3] See Inman & Rubinfeld, *Making Sense of the Antitrust State-Action Doctrine: Balancing Political Participation and Economic Efficiency in Regulatory Federalism*, 75 Tex. L. Rev. 1203, 1250-1263 (1997) (interpreting this Court's state-action cases as moving toward a process-oriented test aimed at enhancing political participation in the regulatory process).

In this case, both the district court and the court of appeals properly focused on whether authorization of an agreement between petitioner and PP&L to divide the Portland market had been "clearly articulated and affirmatively expressed as state policy." Pet. App. A13-A22, E14-E18. In its first opinion, the court of appeals concluded that the PUC's 1972 order was "not particularly clear" with respect to whether the Commission intended to authorize a permanent division of the Portland market. Pet. App. C12. The court nonetheless held that petitioner was entitled to immunity, because it read earlier cases as having replaced "the strict 'clear articulation' test" with a "more liberal 'foreseeability' standard," under which petitioner was required to show only that its anticompetitive conduct was a "foreseeable result" of the PUC's actions and that "circumstances justif[ied] an inference that the agency intended to authorize the conduct." *Id.* at C11-C12. That significant relaxation of a "rigorous" test (*Patrick*, 486 U.S. at 100), threatening unjustified expansion of a "disfavored" immunity (*Ticor*, 504 U.S. at 636), was a serious error of federal law, and prompted the government to file a brief supporting rehearing in the court of appeals. See pages 6-7, *supra*.[4]

The court of appeals' opinion on rehearing, by contrast, correctly recognizes (Pet. App. A26-A29) that it would be inappropriate to "appl[y] a foreseeability test as a substitute for the threshold * * * clear articulation test" specified by this Court (*id.* at A29). Returning instead to a straightforward construction

---

[4] For the Court's convenience, we have lodged with the Clerk copies of the two amicus curiae briefs filed by the government in the court of appeals.

of the "clearly articulated" requirement (*id.* at A13), the court of appeals agreed with the district court that "the [PUC] did not 'specifically and clearly authorize[] by the relevant statutory process' a division of the Portland market into exclusively served territories" (*id.* at A22). Whatever the merits of that conclusion as a factual matter, the court's final opinion does nothing more than apply the correct legal standard to the particular facts of petitioner's case.[5]

2. Petitioner contends (Pet. 16-23) that the court of appeals departed from this Court's precedents by focusing on whether the PUC, as opposed to the state legislature, clearly authorized the division of the Portland market into exclusive territories. We perceive no error in the court's approach in this case.

Petitioner contends (Pet. 16-18) that the court should have accepted Oregon's statutory scheme for

---

[5] The application of any legal test to particular facts will, of course, lead to different results in different cases; and in relatively close cases, such as this case or the *Praxair* case discussed below, it will always be possible to marshal the facts in such a way as to suggest the contrary result. As the government emphasized to the court of appeals (U.S. Reh'g Br. 12), "our concern [in this case was] with the standard * * * apparently adopted" by that court's first opinion. Accordingly, we express no view on whether the courts below were ultimately correct to conclude (see Pet. App. A13-A15, A22, E17), under all the circumstances, that permanent division of the Portland market was not, before 1992, "clearly articulated and affirmatively expressed as state policy." See also U.S. Br. Opposing Second Reh'g 6-7. Both lower courts did, however, reach the same conclusion; and the record supports the court of appeals' observations that the PUC's 1972 order is not "particularly clear" in that regard (Pet. App. C12), and that none of the PUC's pre-1992 orders authorized such a division "forthrightly and clearly" (*id.* at A21).

the allocation of exclusive service territories as a "clearly articulated and affirmatively expressed * * * state policy to displace competition" (Pet. 16), and should have considered the PUC's actions only to determine whether they provided "active supervision" of that policy as it applied to petitioner. As we understand the matter, however, it is undisputed that Oregon law permits (but does not require) the PUC to authorize territorial allocation agreements that would otherwise violate the Sherman Act, and that the PUC's specific approval is required for any such agreement to be valid under state law. See Pet. App. A13-A14. In these circumstances, it was reasonable for the court of appeals to conclude that "the state's clearly articulated policy is *to have the [PUC] decide* whether to sanction anticompetitive conduct" by private utilities, and that therefore a court "must look to the decisions of the [PUC] to determine whether [petitioner's] conduct was part of a clearly articulated state policy." *Id.* at A15 n.8 (emphasis added).

That analysis is consistent with this Court's cases. For anticompetitive conduct to be protected as the product of a "clearly articulated and affirmatively expressed" state policy, it must be expressly authorized by an appropriate governmental authority. See, *e.g.*, *City of Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 372-373 (1991); *Town of Hallie*, 471 U.S. at 43.[6] In *Southern Motor Carriers*, on which

---

[6] Not every express authorization of a type of conduct will suffice to confer antitrust immunity, because the policy the State has "clearly articulated" must be "to displace competition with regulation or monopoly public service." *Town of Hallie*, 471 U.S. at 38-39. The clear articulation requirement is met, however, when the State confers "express authority to take

petitioner relies (Pet. 17-18), collective ratemaking by common carriers satisfied that requirement in three States because state statutes "explicitly permit[ted]" it. 471 U.S. at 63. In a fourth State, the legislature had "not specifically addressed" the practice, but it had adopted an "inherently anticompetitive rate-setting process" that left details to a regulatory commission, and the commission had "exercised its discretion by actively encouraging collective ratemaking." *Id.* at 63-64. The Court treated that agency action as a matter of "clear articulation," not "active supervision." *Id.* at 63-66.

Similarly, in *Ticor* (see Pet. 17), state statutes provided explicitly for "negative option" systems under which rates fixed jointly by insurers and filed with state regulators "became effective unless the State rejected them within a specified period." *Ticor*, 504 U.S. at 629. None of the States involved had rejected the jointly fixed rates, and the government therefore "conceded that the first part of the [*Midcal*] test was satisfied." *Id.* at 631. It was only because of that concession, and the clear state authorization on which it rested, that the outcome in *Ticor* "turned upon the proper interpretation and application of *Midcal*'s active supervision requirement." *Ibid.*

The relevance of a state agency's actions to the immunity analysis depends on the facts of each case. Because Oregon's general statutory policy is to allow private division of service territories only after specific approval by the PUC, the court of appeals reasonably analyzed the PUC's orders to determine whether they "clearly articulated" a specific policy

---

action that foreseeably will result in anticompetitive effects." *Id.* at 43; see also *Omni Outdoor Advertising*, 499 U.S. at 373.

expressly authorizing such a division of the Portland market.[7]

3. Petitioner argues (Pet. 23-29) that the decision below conflicts with the decisions of two federal courts of appeals in state-action immunity cases, and with the decision of an Oregon court sustaining the PUC's 1992 amendment of its 1972 order. We perceive no conflict that calls for resolution by this Court.

a. In *Praxair, Inc.* v. *Florida Power & Light Co.*, 64 F.3d 609, 612 (11th Cir. 1995), cert. denied, 116 U.S. 1678 (1996), Florida law authorized the state Public Service Commission to approve territorial allocations, and the Commission had approved such an arrangement between Florida Power & Light (FPL) and another utility many years before the dispute at issue arose. 64 F.3d at 612. The district court held that the market division implemented a clear state policy and received active state supervision, and the Eleventh Circuit agreed. *Id.* at 611-612. The issue before the court of appeals was the district court's denial of summary judgment on the question whether a particular county was included within the scope of the Commission's order allocating exclusive service territories to FPL. See *id.* at 611.

---

[7] Petitioner's position that agency action should be analyzed only as a matter of "active supervision" (Pet. 17) would lead to a conundrum if the PUC reviewed and rejected an agreement to establish exclusive territories. If, as petitioner argues (Pet. 16), an overall state policy in favor of market allocation is clearly articulated by statute, then either the rejected allocation would have to fail the "active supervision" test, despite the PUC's careful review, or the parties' conduct would be immune from antitrust challenge, despite the State's explicit refusal to authorize it. Neither alternative is reasonable.

Reviewing the record, the *Praxair* court concluded that maps attached to the relevant agreements and the application for regulatory approval, one of which was incorporated by reference in the Commission's order, strongly suggested that the order had indeed allocated the disputed county to FPL. 64 F.3d at 612-613. The court then looked to "the way the parties and particularly the Commission [had] conducted themselves since" the original order—noting, among other things, that FPL was already serving the disputed county (evidently exclusively) at the time of the allocation order, and that the Commission had, before the dispute in question arose, conducted a "comprehensive review of approved territorial agreements," during which it "developed maps which depicted [the county] in FPL's service area." *Id.* at 613. On the basis of all the evidence before it, the court concluded that FPL was entitled to summary judgment.

Nothing in the decision below is inconsistent with *Praxair*'s approach to the state-action question. Contrary to petitioner's submission (Pet. 23-25), the court of appeals in this case did not refuse to consider evidence of developments after the PUC's 1972 order; it simply found the evidence adduced in this case less persuasive than the Eleventh Circuit found the analogous evidence presented in *Praxair*. See Pet. App. A20-A22. Nor did the Eleventh Circuit apply a more relaxed standard of "clear articulation" (see Pet. 24). Because there was no dispute in *Praxair* that *some* territorial allocation had been clearly authorized and actively supervised by the State, the court addressed only the precise scope of that allocation. But even if (as is probable) the standard of clarity required to determine the inclusion of a particular territory is the same as that required to determine that the State

has authorized an allocation of some sort, the evidence of specific regulatory approval adduced in *Praxair*, such as the maps produced by the Florida commission for the specific purpose of showing approved territorial allocations, was substantially stronger than that advanced by petitioner in this case. Compare Pet. App. A15-A22 with 64 F.3d at 612-613. Thus, unlike petitioner (Pet. 25), we see no firm basis for concluding that the *Praxair* court would have recognized immunity on the facts of this case, or that the court below would have rejected a claim of immunity on the facts of *Praxair*.[8]

b. In *Lease Lights, Inc.* v. *Public Service Co. of Okla.*, 849 F.2d 1330 (1988), cert. denied, 488 U.S. 1019 (1989), the Tenth Circuit held in part that a claim to immunity may rest on clear authorization of anticompetitive conduct in a state administrative order that is later held to be invalid. Compare *Omni Outdoor Advertising*, 499 U.S. at 371-372. Nothing in the decision below conflicts with that proposition. The court of appeals held that there was no "clearly articulated" state authorization of petitioner's conduct, not because of some technical defect in the 1972 order, nor because the [PUC] lacked the power under state law to authorize conduct that it purported to authorize, but rather because "the [PUC] failed altogether to exercise its [unquestioned] authority to approve exclusive service territories with any clarity whatsoever." Pet. App. A19-A20.

---

[8] We note that petitioner presumably could have sought a clarifying ruling from the PUC before, rather than after, definitively relying on an overtly anticompetitive agreement, as the utilities in *Praxair* apparently did (see 64 F.3d at 613).

c. In 1990, after respondent had filed the present suit, petitioner asked the PUC to resolve the issue of exclusive service territories in Portland. See Pet. App. A11-A12, M3. In 1992, the Commission issued an order (*id.* at M1-M35) in which it found that it had intended to allocate territories in 1972, amended its 1972 order to reflect that intention, and prospectively settled the allocation of territory and customers between petitioner and PP&L. See *id.* at M27, M30-M33; page 5, *supra*. Petitioner contends (Pet. 26-29) that the decision below conflicts with decisions of the Oregon courts (Pet. App. O1-Q2) affirming that order.

According to the PUC's 1992 order, petitioner's application did ask the Commission to issue, among other things, "a declaratory order affirming that [the Commission's 1972 order] allocated exclusive territory to" petitioner in Portland. Pet. App. M3. As we read the 1992 order, however, what the Commission actually did was something rather different. After extensively reviewing the evidence (*id.* at M13-M22), the PUC concluded that, because the 1972 order did not refer to the State's territorial allocation statutes or say that it was creating exclusive territories, "perhaps it did not unambiguously allocate exclusive service territories" (*id.* at M23). Thus, rather than "affirming" that the 1972 order had clearly divided the Portland market, the Commission concluded that the order was "not a complete and accurate memorial" of what it had intended to accomplish. *Ibid.* The Commission therefore *amended* the 1972 order "nunc pro tunc, to conform to the actual decision intended and followed." *Ibid.*

The court of appeals considered the PUC's 1992 order (Pet. App. A23-A26), but it concluded that the order, as affirmed by the state courts, had no preclu-

sive effect in this case, because it resolved a fundamentally different issue. *Id.* at A25. We agree with that analysis. Even if the PUC had declared the meaning of the 1972 order as a matter of state law, whether that meaning had been sufficiently "clearly articulated and affirmatively expressed" to satisfy the *Midcal* test would have remained a separate question of federal antitrust law, on which the state judgment would have had no preclusive effect. See *Town of Hallie*, 471 U.S. at 44 n.7; cf. *General Motors Corp.* v. *Romein*, 503 U.S. 181, 187 (1992) (existence of contract is a federal question for Contracts Clause purposes). In this case, however, the PUC's 1992 order expressly recognized the same ambiguity that the courts below found in the 1972 order; rather than declaring the 1972 order "clear," the Commission "amend[ed]" it, and then dismissed petitioner's request for a declaration as "moot." Pet. App. M27. If anything, then, the PUC's 1992 decision tends to reinforce the court of appeals' conclusion that the Commission had not previously "clearly articulated" permission for petitioner's anticompetitive conduct.[9]

---

[9] See also *American Can Co.* v. *Davis*, 559 P.2d 898 (Or. Ct. App.), rev. denied, 278 Or. 393 (1977). In 1974, the PUC adjusted PP&L Portland rates because, it said, there was no longer competition between utilities in the city. See Pet. App. A21-A22. In appealing that order, Portland argued that the PUC had ignored contrary evidence concerning the 1972 order and the existence of competition. 559 P.2d at 910. PP&L had also opposed the 1974 order, contending that "competition may potentially exist within Portland if there is a disparity between [PP&L's and petitioner's] rates." *Ibid.* Although it affirmed the PUC's order, the court noted that PP&L's Vice President had been unable to tell the PUC categorically "whether Portland was still a competitive area," and had recognized that, because the utilities' city franchises permitted "each to

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
JOEL I. KLEIN
Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
A. DOUGLAS MELAMED
Deputy Assistant Attorney General
EDWARD C. DUMONT
Assistant to the Solicitor General
ROBERT B. NICHOLSON
DAVID SEIDMAN
Attorneys

APRIL 1998

---

service any Portland customer, disparate rates could engender competitive pressure upon them." *Ibid.*

MOTION FILED
AUG 7 1997

(4)

No. 97-49

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

PORTLAND GENERAL ELECTRIC COMPANY,
Petitioner,

v.

COLUMBIA STEEL CASTING CO., INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE EDISON ELECTRIC INSTITUTE IN SUPPORT OF PETITIONER

EDWARD H. COMER
BARBARA A. HINDIN
JOHANNES W. WILLIAMS
EDISON ELECTRIC INSTITUTE
701 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2696
(202) 508-5000

JOHN F. MANDT
Counsel of Record
PHILLIP A. NICHOLS
BALCH & BINGHAM LLP
P.O. Box 306
Birmingham, Alabama 35201
(205) 251-8100
Attorneys for Amicus Curiae

August 7, 1997

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

27 pp

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-49

PORTLAND GENERAL ELECTRIC COMPANY,
Petitioner,

v.

COLUMBIA STEEL CASTING CO., INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Edison Electric Institute ("EEI") hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The written consent of the petitioner, Portland General Electric Company ("PGE"), has been obtained. In addition, the consent of the Public Utility Commission of the State of Oregon, a party to the proceedings below, has been obtained. The consent of the respondent, Columbia Steel Casting Co., Inc., was requested, but refused.

EEI is the association of the nation's investor-owned electric utility companies and their affiliates worldwide. EEI previously participated in the instant case *amicus curiae,* supporting PGE's Petition to the Ninth Circuit Court of Appeals for Rehearing *En Banc.*

EEI is concerned that the circuit court's decision will have significant impact on electric utilities that are subject to state regulation of service, price, territories and other aspects of their businesses. As pervasively regulated entities, EEI's members are vitally interested in the standards for application of the state action immunity doctrine to state regulatory processes and the activities of regulated firms taken pursuant to those processes.

EEI's members have developed and operate vast networks of electric distribution facilities. These include wires, substations and related facilities which are used to deliver electricity to retail customers. In many instances, the construction and operation of electric distribution facilities is limited by various forms of state regulation establishing exclusive service territories at retail as a means of eliminating uneconomic duplication of wires and related facilities. In many cases, these territorial allocation regulatory programs have been in place for decades. EEI member utilities are involved in extensive arrangements that were established in reliance on the integrity of existing state regulation. In view of EEI members' significant investment in these facilities on behalf of their customers, EEI has a keen interest in the application of federal antitrust principles that are consistent with regulatory programs of this type.

In addition, all fifty states and the District of Columbia currently are considering reforms to the regulation of retail electricity sales and distribution. To date, fifteen states have approved the introduction of retail competition for the sale of electricity. Many of these reforms, while evidencing a state policy favoring competition for certain aspects of the market, are likely to retain significant state regulation of the retail distribution function. These reforms will vest substantial authority in state public utility commissions to impose appropriate limitations on the nature and extent of the competitive activities and to supervise the activities of market participants complying

with those restrictions. Indeed, the Antitrust Division of the Department of Justice ("DOJ") has recognized that the transmission and distribution segments of the industry will remain regulated for the foreseeable future and "[t]he challenge . . . [will be] to foster vigorously competitive generation markets within the context of regulated transmission and distribution monopolies." [1] In this era of industry restructuring, as the mixture of competition and regulation evolves, it will be critical for electric utilities to know with certainty when their actions are subject to antitrust scrutiny and when they are not—especially where applicable regulatory orders have been crafted with less than complete precision.

EEI believes that the brief it seeks permission to file will present the Court with useful discussion of issues that are not likely to be contained in the briefs of the parties. These issues include: a discussion of the likely effect of the circuit court's decision on other state utility territorial statutes; a discussion of the federalism implications of the lower courts' state action immunity standard; and a discussion of the adverse effect that the circuit court's misapplication of the state action immunity doctrine, would have on regulated electric utilities in the current and evolving market environment.

Dated this the 7th day of August, 1997.

---

[1] A. Douglas Melamed, Deputy Assistant Attorney General, Department of Justice, Antitrust Division, *Prepared Statement before the Committee on the Judiciary of the United States House of Representatives—Hearing on Antitrust Aspects of Electric Utility Deregulation* (June 4, 1997) <http://www.usdoj.gov/atr/speeches/1130.htm> (hereinafter, "Melamed Statement").

Respectfully submitted,

EDWARD H. COMER
BARBARA A. HINDIN
JOHANNES W. WILLIAMS
EDISON ELECTRIC INSTITUTE
701 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2696
(202) 508-5000

August 7, 1997

JOHN F. MANDT
Counsel of Record
PHILLIP A. NICHOLS
BALCH & BINGHAM LLP
P.O. Box 306
Birmingham, Alabama 35201
(205) 251-8100
Attorneys for Amicus Curiae

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. THE DECISION BELOW IS BASED ON A FUNDAMENTAL MISUNDERSTANDING OF THIS COURT'S STATE ACTION CASES	3
A. The Ninth Circuit's Reformulation of the "Clear Articulation" Requirement Distorts the Analytic Framework Established by This Court	4
B. The Ninth Circuit Compounded Its Analytical Error by Accepting and Applying "Express Authorization" From the OPUC as a Necessary Predicate for State Action Immunity	9
C. The Test Applied Below, if Followed, Would Embroil Federal Antitrust Courts in Unnecessary Interpretation of State Regulatory Actions and Procedures	12
II. THE DECISION BELOW IS AT ODDS WITH THAT COURT'S OWN DECISIONS AND THOSE OF VARIOUS CIRCUIT COURTS OF APPEALS	16
III. THE LOWER COURT'S ERRONEOUS "CLEAR ARTICULATION" TEST FOR IMMUNITY COULD HAVE FAR-REACHING EFFECTS THAT UNFAIRLY PENALIZE PRIVATE PARTIES AND IMPEDE VALID STATE REGULATORY INITIATIVES	18
CONCLUSION	19

TABLE OF AUTHORITIES

Cases	Page
324 Liquor Corp. v. Duffy, 479 U.S. 335 (1987)	15
California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97 (1980)	4
City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365 (1991)	4, 9
Columbia Steel Casting Co. v. Portland General Electric Co., 111 F.3d 1427 (9th Cir. 1996)	*passim*
Consolidated Gas Co. of Fla. v. City Gas Co. of Fla., 912 F.2d 1262 (11th Cir. 1990), *cert. granted and judgment vacated*, 499 U.S. 915 (1991)	19
FTC v. Ticor Title Insurance Co., 504 U.S. 621 (1992)	4, 7, 8, 13
Fuchs v. Rural Elec. Convenience Co-op. Inc., 858 F.2d 1210 (7th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989)	19
Lease Lights, Inc. v. Public Service Co. of Oklahoma, 849 F.2d 1330 (10th Cir. 1988), *cert. denied*, 488 U.S. 1019 (1989)	17
Llewellyn v. Crothers, 765 F.2d 769 (9th Cir. 1985)	16
Municipal Utilities Bd. of Albertville v. Alabama Power Co., 934 F.2d 1493 (11th Cir. 1991), *opinion after remand*, 21 F.3d 384 (11th Cir. 1994), and *cert. denied*, 513 U.S. 1148 (1995)	19
O'Brien v. Skinner, 414 U.S. 524 (1974)	15
Parker v. Brown, 317 U.S. 341 (1943)	3
Patrick v. Burget, 486 U.S. 94 (1988)	7
Praxair, Inc. v. Florida Power & Light Co., 64 F.3d 609 (11th Cir. 1995), *cert. denied*, —— U.S. ——, 116 S.Ct. 1678 (1996)	17, 19
Southern Motor Carriers Rate Conf., Inc. v. United States, 471 U.S. 48 (1985)	*passim*
Stump v. Sparkman, 435 U.S. 349 (1978)	9, 10
Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985)	*passim*

TABLE OF AUTHORITIES—Continued

Statutes Page

Or. Rev. Stat. § 758.405 5
Or. Rev. Stat. § 758.410 5
16 U.S.C. § 824(a) 18

Secondary Authorities

P. Areeda & H. Hovenkamp, *Antitrust Law* (Supp. 1989) 9
P. Areeda & H. Hovenkamp, *Antitrust Law* (Supp. 1997) 6, 11, 13-14, 16
Elisabeth Pendley, *Deregulation of the Energy Industry*, 31 LAND & WATER L. REV. 27, 64 (1996) 18
A. Douglas Melamed, Deputy Assistant Attorney General, Department of Justice, Antitrust Division, *Prepared Statement before the Committee on the Judiciary of the United States House of Representatives—Hearing on Antitrust Aspects of Electric Utility Deregulation* (June 4, 1997) <http:/www.usdoj.gov/atr/speeches/1130.htm> 18
Samuel H. Porter & John R. Burton, *Legal and Regulatory Constraints on Competition in Electric Power Supply*, PUBLIC UTILITIES FORTNIGHTLY v. 123, no. 11 (May 25, 1989) 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-49

PORTLAND GENERAL ELECTRIC COMPANY,
Petitioner,

v.

COLUMBIA STEEL CASTING CO., INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF *AMICUS CURIAE* OF THE EDISON ELECTRIC INSTITUTE IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE* [1]

The Edison Electric Institute ("EEI") is the association of the nation's investor-owned electric utility companies. Its members generate approximately 78 percent of all electricity in the country and serve 76 percent of the nation's electricity users.

The members of EEI are subject to extensive service and price regulation at the state level. As electric utilities subject to state regulatory supervision, the members of

---

[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

EEI are concerned that the decision of the circuit court will have impact far beyond its direct effect on one electric utility in Oregon. The circuit court's decision significantly and improperly restricts the protection afforded to regulated private parties by the state action doctrine and, in so doing, may expose investor-owned utilities to antitrust risk for actions taken in compliance with state regulatory policy. Moreover, the circuit court's holding may unduly burden and interfere with the proper operation of the state mechanisms that regulate virtually every aspect of the electric utility industry.

This is a critical period of transition for electric utilities. All fifty states and the District of Columbia are considering reforms to the regulation of the distribution and retail sale of electricity. To date, fifteen states have approved the introduction of competition in the retail sale of electricity and certain related activities. All of these states continue to regulate the distribution (or delivery) of electricity and related activities and continue to rely upon regulatory commissions to implement the restructuring process. Some states are experimenting with pilot programs examining the extent to which retail competition may further the interests of utility customers, while others have chosen to learn from the experience of states that pioneer in making changes at the retail level.

In a transitional restructuring process like the current one, prospects for legal uncertainty (enhanced by treble damage exposure) may impede sound decisionmaking by investor-owned utilities. In addition, undue judicial intrusion into state regulatory programs may prevent states from developing optimal regulatory structures. The decision below raises important concerns that could greatly impact EEI's members during this period of transition.

SUMMARY OF ARGUMENT

The lower court's decision reflects a troubling lack of respect for state legislative, regulatory and judicial processes. The circuit court reformulated the two-pronged test

for state action immunity by engrafting a previously unknown requirement that a subordinate state instrumentality must "forthrightly state" a policy to displace competition in local markets, even where the legislature has clearly articulated a state policy to substitute agency regulation for competition. In this case, the Oregon Legislature should have been viewed as the source of state policy. In addition, the circuit court's approach blurred the distinction between the two prongs of the *Midcal* test by requiring a fact-intensive analysis to decide the question of clear articulation. If a factual and procedural inquiry is necessary, it should be performed only as a part of the active supervision prong of the test.

The court of appeals wrongly accepted the Department of Justice's view that foreseeability of anticompetitive restraints requires a showing of express authorization of particular anticompetitive behavior. No such requirement has been recognized by this Court, and indeed, such a requirement has been squarely rejected. The new test announced below would embroil federal courts in the interpretation of state statutory and regulatory pronouncements in a manner foreign to the federalism underpinnings of the state action doctrine.

ARGUMENT

I. THE DECISION BELOW IS BASED ON A FUNDAMENTAL MISUNDERSTANDING OF THIS COURT'S STATE ACTION CASES.

The basic premise of state action immunity announced by this Court first in *Parker v. Brown*, 317 U.S. 341 (1943) is "that Congress, in enacting the Sherman Act, did not intend to compromise the States' ability to regulate their domestic commerce." *Southern Motor Carriers Rate Conf., Inc. v. United States*, 471 U.S. 48, 56 (1985). Around this premise, the Court has fashioned a two-pronged test for analyzing competitive restraints that seeks to balance the interests of federalism and competition:

"first, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

The parts of the two-pronged *Midcal* test serve distinct, though related, purposes. The "clear articulation" prong of the test requires a showing that a state has established a policy to displace competition with regulation. This part of the test does not require that the relevant statute expressly permit the displacement of competition. *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 372 (1991). Rather, the suppression of competition need only be a "foreseeable result" of the legislative authorization. *Id.* at 373. The "active supervision" prong of the test serves to ensure that a private actor is engaging in conduct according to state policy, *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 (1985), and that "the State has played a substantial role in determining the specifics of the economic policy," *FTC v. Ticor Title Insurance Co.*, 504 U.S. 621, 635 (1992).

A. The Ninth Circuit's Reformulation of the "Clear Articulation" Requirement Distorts the Analytic Framework Established by This Court.

As this Court declared in *Southern Motor Carriers*, "[a]s long as the State as sovereign clearly intends to displace competition in a particular field with a regulatory structure, the first prong of the *Midcal* test is satisfied." 471 U.S. at 64. In this case, the Oregon Legislature declared its intention to displace competition with a regulatory structure when it vested authority in the Oregon Public Utility Commission ("OPUC")[2] to approve the creation of exclusive service territories in order to elimi-

[2] Capitalized terms not otherwise defined herein have the meaning assigned by the Court below. *See Columbia Steel Casting Co. v. Portland General Electric Co.*, 111 F.3d 1427 (9th Cir. 1997).

nate and prevent duplication of utility facilities. *See* Or. Rev. Stat. §§ 758.405 & 758.410. The decision below recognized these statutory mechanisms, *see* 111 F.3d at 1433 n.2, but then found them insufficient to satisfy the first *Midcal* prong. *See id.* at 1437.

The Ninth Circuit affirmed the district court's conclusion that "the state did not approve the displacement of competition with territorial monopolies in the Portland market with the clarity required by *Midcal*," *id.* at 1437, because "the 1972 Order fail[ed] to speak with sufficient clarity to satisfy the *Midcal* test." *Id.* The court thus determined that "the OPUC did not 'forthrightly state' a policy of the state of Oregon that was 'clear in its purpose' to displace competition *in the Portland* market with territorial monopolies." *Id.* at 1438 (emphasis added). This portion of the court's reasoning was flawed in two subtle but significant ways: first, the court improperly shifted the source of clearly articulated state policy from the Oregon Legislature to the OPUC; second, the court transformed the straightforward question of whether the legislature "displaced competition with a regulatory structure" [3] into a fact-intensive analysis of whether the subordinate state agency displaced competition in a particular local marketplace. By virtue of these errors, the lower court radically changed the first *Midcal* prong from one focused on the legislature's declaration of policy to one focused on the regulatory agency's specific application of that policy in the Portland market. The separate elements of the *Midcal* test were not intended to be mixed and intertwined in this manner.

This Court consistently has made clear that the source of clearly articulated policy is the state acting as sovereign—typically, the state legislature or possibly a state supreme court. *See, e.g., Southern Motor Carriers*, 471 U.S. at 63 ("*Parker* immunity is available only when the

---

[3] *See Southern Motor Carriers*, 471 U.S. at 64.

challenged activity is undertaken pursuant to a clearly articulated policy of the state itself, such as a policy approved by a state legislature, or a State Supreme Court") (internal citations omitted); P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 212.2 at p. 158 (Supp. 1997) ("when we speak of authority, moreover, we are usually referring to powers flowing from state constitutions or legislation."); *cf. Town of Hallie*, 471 U.S. at 42-44 (focusing on whether the *legislature* contemplated the kind of action complained of, and analyzing text of state statutes); *Southern Motor Carriers*, 471 U.S. at 60 (discussing *source* of state policy). Here, by contrast, the Ninth Circuit all but acknowledged that the legislature had expressed legislative policy with clarity,[4] but determined that "the OPUC cannot confer state action immunity by forming an intent that is not expressed forthrightly and clearly," 111 F.3d at 1440 Inasmuch as the court disregarded the Oregon Legislature as the source of state policy under *Midcal*, the court's search for clear articulation by OPUC was misguided.

Moreover, the Ninth Circuit's version of the clear articulation prong of *Midcal*, by blending the purposes of both prongs, misapprehends the separate yet interrelated

---

[4] Although the court seemed to recognize the "clarity with which chapter 758 expresses a legislative policy" authorizing regulatory approval of exclusive service territory agreements, *see* 111 F.3d at 1437, it placed an extremely limiting interpretation on that policy: "Since the Oregon statute speaks solely of authorizing the OPUC to approve exclusive service territories, the state's clearly articulated policy is to have the OPUC decide whether to sanction anticompetitive conduct. It follows, therefore, that we must look to the decisions of the OPUC to determine whether PGE's conduct was part of a clearly articulated state policy." *Id.* at n.8. To the extent the court read the Oregon statutes as merely "neutral" regarding the establishment of exclusive service territories, it failed to give those statutes a fair reading. *See Southern Motor Carriers*, 471 U.S. at 64; *Town of Hallie*, 471 U.S. at 43. The Oregon statutes in this case cetrainly were not silent; they plainly contemplated the type of agreement entered into by PGE and then left OPUC to supervise the details.

purposes of *Midcal's* two elements. Both elements "are directed at ensuring that particular anticompetitive mechanisms operate because of deliberate and intended state policy." *Ticor*, 504 U.S. at 636 (1992). But beyond that, the two parts of the test serve separate and distinct objectives and must be separately analyzed:

> In the usual case, *Midcal's* requirement that the State articulate a clear policy shows little more than that the State has not acted through inadvertence; *it cannot alone ensure, as required by our precedents, that particular anticompetitive conduct has been approved by the State.* It seems plain, moreover, . . . that sole reliance on the requirement of clear articulation will not allow the regulatory flexibility that these states deem necessary.

Id. at 636-37 (emphasis added). The Ninth Circuit's approach was flawed because it attempted to force the clear articulation requirement "alone to ensure . . . that particular anticompetitive conduct has been approved by the State." In doing so, it impinged on the regulatory flexibility of the states to an impermissible degree.

The improper blurring of the *Midcal* elements below also can be seen from the decisions relied on to support the Ninth Circuit's analysis. The only issue below was whether Oregon had clearly articulated a policy to displace competition, yet the opinion neither analyzed nor relied upon this Court's recent clear articulation pronouncements. Indeed, the opinion never mentioned *Southern Motor Carriers* or *Omni*, and considered *Town of Hallie* only long enough to distinguish it. *See* 111 F.3d at 1444. In large measure, the lower court found guidance in *Patrick v. Burget*, 486 U.S. 94 (1988) and *Ticor* —cases in which the first *Midcal* prong was not before the Court and the only issue was one of active supervision. *See, e.g.*, 111 F.3d at 1436, 1442 (citing *Patrick*); 111 F.3d at 1436, 1437 n.8 (citing *Ticor*). With such heavy reliance on active supervision cases, it is not surprising that the court's perspective on clear

articulation tended to focus excessively on the regulatory oversight provided by OPUC rather than the policy declaration of the Oregon Legislature.[5]

It is worth noting that if the Ninth Circuit's clear articulation test had been applied in *Town of Hallie*, the municipal actor in that case would have failed the test. The Wisconsin statutes certainly made no mention of the application of the general statutory powers to any particular local market (such as area surrounding the City of Eau Claire). There was no arguably ambiguous regulatory authorization in *Town of Hallie* because no state regulatory agency even existed to exercise oversight over municipal sewage systems. Although *Town of Hallie* could be read to recognize a slight difference in the application of the first *Midcal* prong where the defendant is a municipality,[6] the Court has not stated that there are two different standards for clear articulation or elaborated on how the municipal standard might differ from the private party standard. More importantly, the Court's private party cases rely heavily on *Town of Hallie* and its teaching regarding the degree of specificity required in legislative authorization. *See, e.g., Southern Motor Carriers*, 471 U.S. at 48 n.20, 62, 64 (relying on *Town of Hallie's* clear articulation analysis). The clear articulation standard crafted below, if accepted, would undermine the teaching of *Town of Hallie*, would have likely changed the outcome of that case, and should be rejected.

---

[5] The lower court's frequent references to dicta in *Ticor* also ignore the context of *Ticor's* active supervision holding—a "negative option" regulatory structure in which the regulator failed to act. *See Ticor* 504 U.S. at 629. Justice Kennedy's opinion in *Ticor* expressly was limited to that context. *See id.* at 638 (mere potential for state supervision "is not an adequate substitute for a decision by the State."); *id.* at 639 (characterizing case as one involving "agency inaction"). In this case, the OPUC did act and the issue instead turned on the meaning and intent of that action.

[6] *See Town of Hallie*, 471 U.S. at 45.

B. The Ninth Circuit Compounded Its Analytical Error by Accepting and Applying "Express Authorization" From the OPUC as a Necessary Predicate for State Action Immunity.

The decision below is replete with detailed discussion and analysis of what OPUC did and said, and how that squared with the statutory framework established by the Oregon Legislature. Such detailed analysis of an administrative order cannot be reconciled with the Court's warning in *Omni* against undue intrusion into state process. While *Omni* recognized that a municipality might be said to have acted outside its authority "whenever the nature of its regulation is substantively or even procedurally defective . . . such an expansive interpretation of the *Parker* defense authorization requirement would have unacceptable consequences." 499 U.S. at 371. The unacceptable consequences would include tearing the fabric of federalism itself. *Id.* at 372.[7] Consequently, this Court required that federal courts "adopt a concept of authority broader than what is applied to determine the legality of the municipality's action under state law." *Id.* at 372. This rule must apply with equal force to the actions of a subordinate state administrative agency.

The Court in *Omni* compared its examination of a subordinate governmental entity's authority in the state action immunity context to the examination of a state judge's authority in the judicial immunity context. *Id.* (citing *Stump v. Sparkman*, 435 U.S. 349 (1978)). In *Stump*, the Court ruled that judicial immunity applies "even if [the judge's] exercise of authority is flawed by the commission of grave procedural errors." *Id.* at 359.

---

[7] As noted in *Omni*, commentators have cautioned against allowing a federal antitrust court to become " 'the standard reviewer not only of federal agency activity but also of state and local activity whenever it is alleged that the governmental body, though possessing the power to engage in the challenged conduct, has actually exercised its power in a manner not authorized by state law.' " *Id.* at 372 (quoting P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 212.3b, p. 145 (Supp. 1989)).

Further, the Court concluded that "the nature of the act itself" determines whether it is a "judicial" act that imbues the judge with judicial immunity. *Id.* at 362. Specifically, the *Stump* court focused on whether the judge's act was "a function normally performed by a judge" and whether the parties "dealt with the judge in his judicial capacity." *Id.* There is no doubt that the 1972 Order was a function normally performed by the OPUC and that the parties dealt with the OPUC in its official capacity. No further intrusion into the OPUC's authority was appropriate.

In its consideration of how clearly a state policy must be articulated by the legislature under *Midcal's* first prong, the *Town of Hallie* Court explained that the relevant inquiry should focus on foreseeability. *See Town of Hallie*, 471 U.S. at 42 (conduct need only be "contemplated," not expressly mentioned in the statute). In attempting to apply this foreseeability test, however, the Ninth Circuit completely missed the point and read *Town of Hallie* as requiring "express authorization" of the anticompetitive conduct. *See* 111 F.3d at 1444 ("the [*Town of Hallie*] Court held that this result was foreseeable because the state expressly authorized the city's anticompetitive behavior"); *id.* ("As the Antitrust Division puts it, 'express authorization [is] the necessary predicate for the Supreme Court's foreseeability test.' ").[8] *Town of Hallie* does not impose this requirement and flatly rejects "express authorization" as a predicate for foreseeability.

The *Town of Hallie* opinion did not confer immunity because the Wisconsin Legislature had expressly authorized the municipality's anticompetitive behavior. To the contrary, the Court stated that "[i]t is not necessary, as the Towns contend, for the state legislature to have stated explicitly that it expected the City to engage in conduct that would have anticompetitive effects." *Town of Hallie,*

[8] Neither the Antitrust Division nor the court below cited specific authority for the "express authorization" requirement.

471 U.S. at 42. The extent of authority expressly granted by the Wisconsin Legislature was no more than the general authority to provide sewage services and "to determine the areas to be served." *Id.* at 42. The Court found that authorization sufficient because anticompetitive effects "logically would result from this broad grant of authority." *Id.* In effect, the Court inferred the requisite site authorization and did not require that it be expressly stated.

The Wisconsin statutes in *Town of Hallie* certainly did not expressly authorize the anticompetitive conduct complained of—that is, tying sewage treatment to sewage collection and transportation—or in any respect speak to the particular geographic area surrounding the City of Eau Claire. Nonetheless, the Court found that they satisfied the clear articulation requirement. The Oregon statutes here are much more explicit than those found sufficient in *Town of Hallie* because they contemplate OPUC approval of contracts "between competitors that divide markets into exclusive service territories." *See* 111 F.3d at 1433 n. 2. In short, this Court has found clear articulation under circumstances much less compelling than the instant case. *See, e.g., Southern Motor Carriers,* 471 U.S. at 63-64 (adequate authorization found in broad grant of statutory authority to prescribe "just and reasonable" rates, which made clear the legislature's intent that rates be set by regulators rather than the market).[9]

The decision in *Southern Motor Carriers* also counsels against requiring "express authorization" in the manner that the lower court did. As the Court noted there, "[a] private party acting pursuant to an anticompetitive regulatory program need not 'point to a specific, detailed legislative authorization' for its challenged conduct." *Southern Motor Carirers,* 471 U.S. at 64. According to the Court,

---

[9] *See also* P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 212.3 at p. 163-64 (Supp. 1997) ("Inevitably, the antitrust courts have not insisted upon express statutory authorization of the challenged activity with an intent to displace the antitrust laws.").

> [i]f more detail than a clear intent to displace competition were required of the legislature, states would find it difficult to implement through regulatory agencies their anticompetitive policies. Agencies are created because they are able to deal with problems unforeseeable to, or outside the competence of, the legislature. Requiring express authorization for every action that an agency might find necessary to effectuate state policy would diminish, if not destroy, its usefulness.

Id. at 64. These statements are especially instructive here because *Southern Motor Carriers* was a private party case addressing the clear articulation requirement rather than the active supervision requirement. The Ninth Circuit's probing and nondeferential review of the Oregon regulatory process ignored this admonition. Such detailed antitrust court review of the actions of state agencies would seriously compromise the usefulness of delegation to subordinate state agencies.

The court's error led it to seek clear articulation from the wrong source, then to proceed to dissect the deliberative process of OPUC in a misguided search for express authorization. In the end, the court found itself considering the foreseeability of the Portland service area agreement in relation to the 1972 Order when it should have been considering the foreseeability of that agreement in relation to the admittedly clear Oregon statutory framework.

C. The Test Applied Below, if Followed, Would Embroil Federal Antitrust Courts in Unnecessary Interpretation of State Regulatory Actions and Procedures.

In *Town of Hallie*, this Court commented on the threat to federalism that would flow from a clear articulation test predicated upon "explicit authorization" by the State:

> Requiring such a close examination of a state legislature's intent to determine whether the federal anti-

> trust laws apply would be undesirable also because it would embroil the federal courts in the unnecessary interpretation of state statutes. Besides burdening the courts, it would undercut the fundamental policy of *Parker* and the state action doctrine of immunizing state action from federal antitrust scrutiny.

471 U.S. at 44 n.7. The Court was rightly concerned about the prospect for "embroiling" federal courts in matters of state law. State action immunity is "conferred out of respect for ongoing regulation by the State," *Ticor*, 504 U.S. at 633, and this respect for state regulation lies at the core of *Parker*. Excessive federal court involvement in interpretive issues under state law would fail to accord the appropriate respect. Such a standard would undermine federalism by sending mixed signals to regulated parties and exposing them to antitrust damages for conduct sanctioned under state law.

To the extent these concerns are implicated by difficult state law questions of statutory interpretation, they are similarly (or perhaps more forcefully) raised where state regulatory and judicial processes are involved. One leading treatise recently described the implications of excessive federal involvement in state administrative programs:

> . . . the question remains whether antitrust courts ought to review state agencies for "ordinary" errors in essentially the same way they review federal administrative errors. Wise and efficient federalism calls for no such result. The *Lafayette* authorization requirement should not be manipulated in such a way as to thwart the fundamental *Parker* policy against antitrust scrutiny of state action. The antitrust court should require no more than that the result of the agency's act or decision was of the sort contemplated by state anticompetitive policy. "Ordinary" errors or abuses in the administration of jurisdiction conferred by the state should be left for state tribunals to review.

P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 212.3b at p. 181 (Supp. 1997). Wise and efficient federalism should continue to guide federal courts regarding the first prong of *Midcal*, and this Court should vigorously resist efforts to manipulate the legal standard by intruding on the operation of state agencies.

The Ninth Circuit took a very different approach—one that embroiled it in determining whether OPUC (as distinguished from the Oregon Legislature) had spoken with "sufficient clarity." The court compared language in the 1972 Order with the text of other portions of that order relating to a different locality, compared the 1972 Order with an ordinance of the Portland City Council, and attached great significance to OPUC's failure to mention chapter 758 of the Oregon Code in the text of the 1972 Order. *See* 111 F.3d at 1437-38. The court was "struck by the precision and care with which OPUC cited various statutory provisions" and used elaborate interpretive arguments and negative inferences to find the 1972 Order ambiguous. *See id.* In finding this ambiguity, the lower court had to sidestep OPUC's own account of the "statutory import" of its 1972 Order, subsequent OPUC orders that supported PGE's interpretation,[10] and even pronouncements of the Oregon judiciary regarding the meaning of the 1972 Order. *See id.* at 1438, 1441-42. To merely describe this complex inquiry is to refute it. Even if the lower court correctly navigated through the competing inferences and interpretive principles (and EEI believes that it did not), the court's methodology was not grounded, as it must be, in respect for state regulation.

EEI also submits that the Ninth Circuit's treatment of the 1972 Order entails an unrealistic view of state administrative processes. In *Town of Hallie*, this Court refused to require an explicit legislative declaration of contem-

---

[10] OPUC's 1992 Order not only recognized that the Commission had intended to allocate exclusive service areas, but also "confirmed" that it had done so in the 1972 Order. *See* App. M1, M23.

plated anticompetitive effects because such a rule would "[embody] an unrealistic view of how legislatures work and of how statutes are written." *See* 471 U.S. at 43. The Court likewise should correct the lower court's unrealistic view of regulatory orders. To be sure, some are crafted with great care and precision. It is equally sure, however, that some state administrative orders are drafted without detailed internal and external comparisons of the type made below and with less than perfect statutory citations. A single, perceived glitch in the text of an order should not make the difference between complete immunity and treble damages. This is especially true where, as here, the state administrative and judicial system has concluded that there was no glitch.

The lower court's treatment of the judicial review process relating to the 1992 Order likewise was too quick to dismiss the conclusions of the Oregon judiciary. Federal antitrust courts should be extremely reluctant to disregard regulatory and judicial interpretations of state law. *Cf. 324 Liquor Corp. v. Duffy*, 479 U.S. 335, 344 n.6 (1987) (quoting *O'Brien v. Skinner*, 414 U.S. 524, 531 (1974) ("We may not 'construe a state statute contrary to the construction given it by the highest court of a State.' ")

The Ninth Circuit determined that the issue addressed in OPUC's 1992 Order was "not identical to the state-action immunity issue," 111 F.3d at 1441, and therefore, that the 1992 Order and the Oregon courts' affirmance of that order were of little relevance. Even if the issue in the Oregon proceedings technically differed from the federal immunity issue, the holdings of the state agency and courts should have been instructive. *See Town of Hallie*, 471 U.S. at 44-45 n.8 (state interpretation of the statutes is "instructive on the question of the state legislature's intent in enacting the statutes"). If anything, federal antitrust analysis should be more (not less) deferential to the agency than state judicial analysis. In this case, the court's im-

munity standard differed in the wrong direction: it was "too grudging in its inference of authority." [11]

II. THE DECISION BELOW IS AT ODDS WITH THAT COURT'S OWN DECISIONS AND THOSE OF VARIOUS CIRCUIT COURTS OF APPEALS.

The Ninth Circuit's deconstruction of the 1972 Order conflicts with the holdings of a number of other circuit courts, including the Ninth Circuit's own decision in *Llewellyn v. Crothers*, 765 F.2d 769 (9th Cir. 1985). Relying on federalism principles, the *Llewellyn* court recognized that where a state official is given authority by the legislature to suppress competition through the setting of rates, state action immunity is not lost because the official's actions are "taken in a procedurally improper manner." 765 F.2d at 773-74 ("[A]ctions otherwise immune should not forfeit that protection merely because the state's attempted exercise of its power is imperfect in execution under its own law.").

The distinction of *Llewellyn* offered below underscores the court's distortion of the clear articulation requirement. While the Ninth Circuit correctly viewed the clear articulation requirement as applicable to the state legislature in *Llewellyn*, the court below transposed that requirement and applied it to actions of a subordinate state agency. *Compare Llewellyn*, 765 F.2d at 774 (official's "actions were taken pursuant to an express state policy and were of a kind contemplated by the statutory scheme"), *with Columbia Steel*, 111 F.3d at 1439 ("the OPUC did not clearly exercise its statutory authority to approve the allocation of exclusive service territories in Portland"). The statement by the court below admits the "statutory authority" of the OPUC. Had the court focused on whether the OPUC's 1972 Order was consistent with state policy and the type of action contemplated by

---

[11] P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 212.3 at pp. 174, 176-77 n.68 (Supp. 1997).

Oregon's statutes, as the *Llewellyn* court did, it would have found clear articulation.

Regulated utilities should not be required to obtain judicial review of every public commission order to ascertain whether the substantive and procedural aspects of the commission's actions conformed with state law. The rationale below would require as much, and even then, utilities would not be assured of antitrust immunity because of the possibility that federal courts would interpret state law differently. Such a result conflicts with the Tenth Circuit's decision in *Lease Lights, Inc. v. Public Service Co. of Oklahoma*, 849 F.2d 1330, 1334 (10th Cir. 1988), *cert. denied*, 488 U.S. 1019 (1989) (state action immunity should protect those "reasonably relying on the appearance of legality when a state agency's exercise of power is unauthorized"). PGE must be entitled to rely on the 1972 Order if the *Parker* doctrine's respect for state governmental process has continued vitality.

OPUC's subsequent recognition that the two utilities did not compete in Portland should have enhanced PGE's right to rely on the 1972 Order. Instead, the Ninth Circuit gave those subsequent orders no effect whatsoever. Such an approach is at odds with the Eleventh Circuit's decision in *Praxair, Inc. v. Florida Power & Light Co.*, 64 F.3d 609 (11th Cir. 1995), *cert. denied*, —— U.S. ——, 116 S.Ct. 1678 (1996). The issue in *Praxair* was whether a utility service area agreement had been sufficiently scrutinized by state regulators. It should be noted that this analysis was performed under the active supervision prong of *Midcal* (as it should have been here), not the clear articulation prong. As in the present case, decades passed during which the public utilities assumed that a territorial division was in effect. The state agency later issued an interpretive order clarifying its earlier territorial allocation order. The Eleventh Circuit found both the parties' conduct and the Florida Commission's actions subsequent to its original order determinative of the existence of active supervision. *Id.* at 613-14.

III. THE LOWER COURT'S ERRONEOUS "CLEAR ARTICULATION" TEST FOR IMMUNITY COULD HAVE FAR-REACHING EFFECTS THAT UNFAIRLY PENALIZE PRIVATE PARTIES AND IMPEDE STATE REGULATORY INITIATIVES.

Regulated electric utilities currently operate in markets that are amidst great change. All fifty states and the District of Columbia have initiated legislative or regulatory proceedings to examine retail competition, deregulation or restructuring of the electric utility industry. Traditionally, regulation of the electric utility industry has been shared by the Federal Energy Regulatory Commission ("FERC") and the states. FERC has jurisdiction over interstate transmission of electricity and sales of electricity at wholesale. 16 U.S.C. § 824(a) (1988). States maintain jurisdiction over retail sales as well as distribution. *Id.*; *see also* Elisabeth Pendley, *Deregulation of the Energy Industry*, 31 LAND & WATER L. REV. 27, 64 (1996). Increased competition may require FERC and the states to redefine their regulatory responsibilities. *Id.* at 74. Indeed, the evolution of the electric utility industry and the corresponding changes to its regulatory structure call for increased confidence that compliance with state regulation will not give rise to antitrust liability.

Considering that electric utilities will remain subject to significant regulation even in a deregulating environment[12] and that the potential exists for possible conflicts over jurisdictional issues, electric utilities have a particularly strong need at this time for clear guidance regarding the scope of state action protection. If allowed to stand, the decision below threatens to compound the legal uncertainty surrounding the restructuring process and heighten the possibility of inconsistent federal and state rules.

The need for clarity and guidance regarding the interplay between the state action doctrine and territorial regulation is underscored by the numerous appellate cases

---

[12] *See* Melamed Statement *supra*.

that have involved that interplay. *See Praxair*; *Municipal Utilities Bd. of Albertville v. Alabama Power Co.*, 934 F.2d 1493 (11th Cir. 1991), *opinion after remand*, 21 F.3d 384 (11th Cir. 1994), and *cert. denied*, 513 U.S. 1148 (1995); *Consolidated Gas Co. of Fla. v. City Gas Co. of Fla.*, 912 F.2d 1262 (11th Cir. 1990) *cert. granted and judgment vacated* 499 U.S. 915 (1991); *Fuchs v. Rural Elec. Convenience Co-op. Inc.*, 858 F.2d 1210 (7th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989). State territorial allocation of electricity distribution facilities is likely to continue, albeit in a revised form when states introduce retail competition in the sale of electricity,[13] and that fact will further increase the need for clear guidance concerning the application of the state action doctrine.

CONCLUSION

The approach to clear articulation applied below evidences a troubling lack of respect for state legislative, regulatory and judicial process. For the reasons stated, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

EDWARD H. COMER
BARBARA A. HINDIN
JOHANNES W. WILLIAMS
EDISON ELECTRIC INSTITUTE
701 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2696
(202) 508-5000

JOHN F. MANDT
Counsel of Record
PHILLIP A. NICHOLS
BALCH & BINGHAM LLP
P.O. Box 306
Birmingham, Alabama 35201
(205) 251-8100
Attorneys for Amicus Curiae

August 7, 1997

---

[13] Numerous states have territorial allocation status for electric service. *See* Samuel H. Porter & John R. Burton, *Legal and Regulatory Constraints on Competition in Electric Power Supply*, PUBLIC UTILITIES FORTNIGHTLY v. 123, no. 11 (May 25, 1989) (at least 23 states then had service area allocation statutes). Indeed, EEI's own investigation suggests that approximately 36 states currently permit or require some form of exclusive territorial division of utility service.

MOTION FILED

APR 29 1998

(7)

No. 97-49

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

PORTLAND GENERAL ELECTRIC COMPANY,

Petitioner,

v.

COLUMBIA STEEL CASTING CO, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* WITH BRIEF *AMICUS CURIAE* SUPPORTING PETITION FOR CERTIORARI

CHARLES D. GRAY.
GENERAL COUNSEL

JAMES BRADFORD RAMSAY
ASSISTANT GENERAL COUNSEL & COUNSEL OF RECORD

COUNSEL FOR AMICUS CURIAE

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS
Post Office Box 684
Washington, D.C. 20044-0684

(202) 898-2200

Dated: April 29, 1998

22 pp

No. 97-49

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

PORTLAND GENERAL ELECTRIC COMPANY,

Petitioner,

v.

COLUMBIA STEEL CASTING CO, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The National Association of Regulatory Utility Commissioners (NARUC) hereby respectfully moves for leave to file the accompanying brief as *amicus curiae*. The written consent of the Petitioner has been obtained and filed with the Clerk of the Court. The Respondent has not consented.

The NARUC is a quasi-governmental nonprofit organization founded in 1889. Within its membership are the governmental bodies of the fifty States engaged in the economic and safety regulation of carriers and utilities. The mission of the NARUC is to serve the public interest by seeking to improve the quality and effectiveness of public regulation in America.

More specifically, the NARUC contains the State officials charged with the duty of regulating the retail rates and services of electric, gas and telephone utilities operating within their respective jurisdictions. These officials have the obligation under State law to assure the establishment and maintenance of such services within respective franchised utility service territories as may be required by the public convenience and necessity, and to ensure that such services are provided at rates and conditions which are just, reasonable, and nondiscriminatory for all consumers.

In this case, this Court has been asked to review the relationship of Federal antitrust law and traditional and pervasive State regulatory programs through which public utilities and common carriers provide their essential services to the public. In the decision for which Petitioner seeks the Court's review, the U.S. Court of Appeals for the Ninth Circuit held, *inter alia*, that one of the fundamental aspects of State utility regulation -- the requirement that utilities operate in exclusive franchise territories -- can be properly enjoined under the provisions of the Sherman Act. As such, the decision strikes at the heart of the State regulatory programs administered by the members of the NARUC which are based on the long-established and settled principle that duplication of utility facilities in a given geographic market will result in inefficient and less affordable service to the consuming public. *See*, *General Motors Corp. v. Tracy*, 519 U.S. ___, ___, 136 L.Ed.2d

761, 774 (1997). In the language of this Court's formulation of the State action defense to Federal antitrust liability, the creation and maintenance of franchised utility service territories has been and continues to be "affirmatively expressed" and "actively supervised" regulatory policy in virtually every State in the Nation.

If broadly applied, the Court of Appeals' decision will have serious consequences for the regulatory policies and procedures of each of the NARUC's member commissions. Therefore, we believe that the *amicus* participation of a national organization such as the NARUC, which represents each of these State agencies, is justified.

The NARUC respectfully requests that the accompanying brief be accepted for filing notwithstanding the fact that it is submitted beyond the time period established by the Court's rules. The NARUC files this motion and its brief at this time in light of the *amicus* brief submitted very recently by the Solicitor General on behalf of the United States Government. In its brief, the Government argues for an unnecessarily narrow construction of the State action doctrine that could have the effect of undermining State regulatory commissions' ability to adapt regulatory policies to their responsibility to protect the public interest. As the energy and communications industries continue their ongoing transformation from vertically integrated monopolies to greater competition in the marketplace, we believe that it is important for the NARUC to

describe the critical need for State regulatory commissions to have the flexibility to tailor regulatory tools to the needs of competitive markets while protecting retail customers, free from stricture under the Sherman Act.

Accordingly, the NARUC respectfully requests that the accompanying brief be accepted for filing.

Respectfully submitted,

CHARLES D. GRAY
General Counsel

JAMES BRADFORD RAMSAY*
Assistant General Counsel
(Counsel of Record)

National Association of Regulatory
Utility Commissioners
Suite 603, Old Post Office Pavilion
Post Office Box 684
Washington, D.C. 20044
(202) 898-2200

Counsel for *Amicus Curiae*

April 29, 1998

TABLE OF CONTENTS

Page

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 4

ARGUMENT 6

LEFT UNREVIEWED BY THIS COURT, THE COURT OF APPEALS' DECISION WILL CAUSE UNWARRANTED HARM TO STATE REGULATORY POLICIES AND PROCEDURES 6

I. This Court has protected the flexibility of State practices and procedures for utility regulation 6

II. The Court of Appeals' decision exceeds the role of Federal antitrust courts in reviewing State regulatory policies 11

CONCLUSION 14

TABLE OF AUTHORITIES

CASES: **PAGE**

Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission, 461 U.S. 375 (1983)..... 6

California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 87 (1980) .... *passim*

Duquesne Light Co. v. Barasch, 488 U.S. 299 (1989).....7-8

FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944)..... 7

General Motors Corp. v. Tracy, 519 U.S. ___, 136 L.Ed.2d 761 (1997).....6-7

Indianapolis Power and Light Co. v. Interstate Commerce Commission, 587 F.2d 1098 (7th Cir. 1982) 2

Parker v. Brown, 317 U.S. 341 (1943) 3

Permian Basin Area Rate Cases, 390 U.S. 747 (1968) 7-8

Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985).....13-14

United States of America v. Southern Motor Carrier Rate Conference, et al., 467 F.Supp. 471 (N.D. Ga. 1979), *aff.* 672 F.2d 469 (5th Cir. Unit "B" 1982); *aff. en banc,* 702 F.2d 532 (5th Cir. Unit "B" 1983, *rev'd*, 471 U.S. 48 (1985) 2,5,9-11

Washington Utilities and Transportation Commission v. FCC, 513 F.2d 1142 (9th Cir. 1976) 2

STATUTES:

Section 2 of the Sherman Act, 15 U.S.C. § 2 (1990)..... 2

47 U.S.C. § 410(c)(1994)..... 2

No. 97-49

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

PORTLAND GENERAL ELECTRIC COMPANY,

Petitioner,

v.

COLUMBIA STEEL CASTING CO, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AS *AMICUS CURIAE* SUPPORTING PETITION FOR CERTIORARI

INTEREST OF *AMICUS CURIAE*

The National Association of Regulatory Utility Commissioners (NARUC) submits this brief as *amicus curiae* in support of Petitioner due to the substantial harm the decision below could have upon the regulation of public utilities by its member State regulatory commissions. As described in the previous motion, the NARUC is a quasi-governmental nonprofit organization founded in 1889. The Association has no corporate

Pursuant to Rule 37.6, Counsel for NARUC represents that no parties to this case authored this brief, in whole or part. No person or entity, other than *amicus curiae*, made any monetary contribution to its preparation or submission.

parents or subsidiaries. Recognized by the Congress as "the national organization of the State commissions", 47 U.S.C. § 410(c) (1994), the NARUC presents the collective interest of State commissions charged with regulating the rates and conditions of service for the intrastate operations of electric, natural gas and telephone utilities. The NARUC's member commissions are obligated under State law to ensure that the rates charged to retail consumers are just and reasonable. The NARUC's mission is to serve the public interest by seeking to improve the quality and effectiveness of public utility regulation in America. Both Congress and the Federal courts have long recognized that the NARUC is a proper party to represent the collective interest of State regulatory commissions.[1]

In the decision for which Petitioner Portland General Electric Company (PGE) seeks this Court's review, the United States Court of Appeals for the Ninth Circuit held that PGE, an electric utility company regulated by the Oregon Public Utility Commission ("OPUC"- a member commission of the NARUC), violated section 2 of the Sherman Act, 15 U.S.C. §2 (1990) by acquiring and maintaining an exclusive service

---

[1] *See, for example, United States of America v. Southern Motor Carrier Rate Conference, et al.*, 467 F.Supp. 471 (N.D. Ga. 1979), *aff.* 672 F.2d 469 (5th Cir. Unit "B" 1982); *aff. en banc*, 702 F.2d 532 (5th Cir. Unit "B" 1983, *rev'd*, 471 U.S. 48 (1985). *See also, Indianapolis Power and Light Co. v. Interstate Commerce Commission*, 587 F.2d 1098 (7th Cir. 1982); *Washington Utilities and Transportation Commission v. FCC*, 513 F.2d 1142 (9th Cir. 1976).

territory with the approval of the OPUC.[2] By its decision, the Court of Appeals held that PGE's 1972 agreement with another electric distributor, Pacific Power & Light (PP&L) to divide electric service within the City of Portland was not exempt from antitrust liability under the "State action" doctrine established by this Court in its decision in *Parker v. Brown*, 317 U.S. 341 (1943) and its progeny. Specifically, the Court below held that the State action defense was unavailable because the 1972 agreement, as affirmatively and specifically approved by the OPUC, did not constitute "a clearly articulated and affirmatively expressed" regulatory policy of the State of Oregon to establish exclusive service territories for the two companies.

The Court of Appeals' decision in this case is of critical importance to State regulators. By holding that the OPUC's approval of the 1972 agreement, as subsequently affirmed by the State's Supreme Court, was insufficient evidence of the State's regulatory policy, the Court of Appeals has greatly restricted the regulatory flexibility of the State commission. The Court has gone far beyond the State action

---

[2] The Court of Appeals issued three separate opinions in this case: the final opinion (Petitioner's Appendix A) is reported at 111 F.3d 1427. The first opinion (App.C) is reported at 60 F.3d 1390. The opinion (App. B) vacating the first opinion is reported at 103 F.3d 1446. The opinion of the District Court (App. E) granting partial summary judgment is reported at 770 F.Supp. 562. Subsequent reference will be made to these decisions, as they appear in Petitioner's Appendix, in this form: App. at __.

tests this Court has applied in the past to other State regulatory policies and practices.

Accordingly, this case raises important issues, which should be addressed by this Court, concerning the manner in which State commissions, legislatures and courts establish and implement their policies for the economic regulation of utilities and common carriers. As the National representative of the State commissions, the NARUC's interest in addressing these State action issues is strong, compelling its participation in this case.[3]

SUMMARY OF ARGUMENT

By its decision, the Court of Appeals has sanctioned the use of Federal antitrust law to scrutinize and reject a regulatory practice basic to utility regulation in virtually every State: the establishment of exclusive franchised service territories in which utilities are legally obligated to provide service to all consumers located within their respective territories. By faulting the manner in which the State of Oregon has established and implemented its service territory policy within the City of Portland, the Court of Appeals has called into question similar practices across the country.

---

[3] Consistent with this Court's Rule 37.1, the NARUC will not repeat the discussion and analysis of the State action doctrine contained in the Petition for Writ of Certiorari. The NARUC supports those arguments.

Accordingly, this case raises issues of broad National scope and import that should be reviewed by this Court.

In addition, the Court of Appeals has misconstrued this Court's decisions in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 87 (1980) and *Southern Motor Carriers Rate Conference v. United States,* 471 U.S. 48 (1985) to assess State policymaking and regulatory practices and procedures far beyond any intrusion this Court, or other Courts of Appeals, have sanctioned. And the issue reaches beyond the question of franchised service territories. Under the Court of Appeals' reasoning, any policy or practice established by a State regulatory commission under general statutory authority, such as the common directive to ensure "just and reasonable" rates, will be at risk, even if the decision of the State commission has been affirmed by the State's highest court as consistent with the intent of the State's legislature. Accordingly, at a time of major upheaval in utility regulation, the Court should review the decision below and establish clarity and consistency in this important area of the law.

ARGUMENT

LEFT UNREVIEWED BY THIS COURT, THE COURT OF APPEALS' DECISION WILL CAUSE UNWARRANTED HARM TO STATE REGULATORY POLICIES AND PROCEDURES

I. This Court has protected the flexibility of State practices and procedures for utility regulation

As this Court has acknowledged, "the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States." *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, 461 U.S. 375, 377 (1983). Last term, in analyzing State regulation of the retail distribution of natural gas (but equally applicable to electric utilities), the Court recognized the pervasive role played by the States in regulating utility services: "To this day, all 50 States recognize the need to regulate utilities engaged in local distribution of natural gas." *General Motors Corp. v. Tracy*, 519 U.S. ___, ___, 136 L.Ed.2d 761, 777 (1997). As analyzed there, the regulatory model used by the States to structure natural gas distribution services has been the same model at issue in this electric utility case – "a single, local franchise with a business opportunity free of competition...balanced by regulation and the imposition of obligations to the consuming public...." *Id.* at 775. While both the retail electric and natural gas industries are now in a

transition to greater market competition, the "dual market" analysis described in the *General Motors* decision (i.e. regulated core markets in defined service territories for distribution and competitive energy suppliers serving other non-core markets) remains the basic approach employed by the States. *Id.* at 777, n. 10.

Moreover, the Court has often reaffirmed the constitutional principle that in discharging this important function, the State regulatory commissions have broad authority "to decide what ratesetting methodology best meets their needs in balancing the interests of the utility and the public." *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 316 (1989) (*Duquesne*). In *Duquesne*, the Court observed that State regulation of utilities providing retail service to their customers is a difficult undertaking, requiring the consideration of a multitude of factors: "The economic judgments required in rate proceedings are often hopelessly complex and do not admit of a single correct result." *Id.* at 314. Accordingly, this Court has been loathe to restrict the flexibility of regulatory bodies, both State and Federal, to exercise their "economic judgment" on behalf of utility ratepayers. *Id., see also, FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944); *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968).

In *Duquesne*, the Court also described the role that regulatory bodies such as the OPUC perform within State government. "[T]he Pennsylvania PUC is essentially an administrative arm of the legislature." 488 U.S. at 313. Accordingly, like legislative bodies, State commissions "must be free, within the limitations imposed by pertinent constitutional and *statutory commands*, to devise methods of regulation capable of equitably reconciling diverse and conflicting interests." *Id.* at 313-314, citing *Permian Basin*, *supra*, 390 U.S. at 767 (emphasis in original). In short, in its analysis of the constitutional limitations on commission authority, this Court, both historically and quite recently, has sought to protect the flexibility and discretion through which regulatory judgment is exercised by both State and Federal commissioners.

Similarly, this Court's recent antitrust decisions applying the State action doctrine have consistently recognized the need to preserve regulatory flexibility. In applying the two elements of what has come to be known as the *Midcal* test -- that private anticompetitive conduct which is conducted pursuant to an "affirmatively expressed and clearly articulated" State policy which is "actively supervised" by the State is exempt from antitrust liability -- the Court has not attempted to interfere with the traditional tools State commissions have used

to regulate utility rates and services.[4] The Court has not used the *Midcal* formulation to micromanage State utility policymaking, whether at the PUC or legislative level, nor has the effectiveness of State regulation been examined with a Federal microscope to determine how "actively" regulators have discharged their responsibilities.

For example, with respect to the "clear articulation" prong of *Midcal* – the question at issue in this case -- the Court in *Southern Motor Carriers Rate Conference v. United States,* 471 U.S. 48 (1985) held that a long-standing decision of the Mississippi Public Service Commission allowing trucking companies to collectively file intrastate rate proposals was sufficient to provide State action immunity to private truckers participating in the collective activity. *Id.* at 63-64. The Mississippi commission made this decision pursuant to a generalized "just and reasonable" rate standard, and not specific authorization from the State's legislature. The Court found this expression of State policy sufficient:

> The statute provides that the Commission is to prescribe "just and reasonable" rates for the intrastate transportation of general commodities. The legislature thus made clear its intent that intrastate rates would be determined by a regulatory agency, rather than by the market. The details of the inherently anticompetitive rate-setting process, however, are left to the agency's

---

[4] *See, California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 87, 105 (1980).

> discretion. The State Commission has exercised its discretion by actively encouraging collective ratemaking among common carriers. We do not believe that the actions petitioners took pursuant to this regulatory program should be deprived of Parker immunity.
>
> 471 U.S. at 63-64
> (citations omitted)

Even though the Mississippi legislature had enacted no specific legislation with respect to collective ratemaking, the Court attributed to the State as sovereign the decision of its regulatory commission authorizing such activities. *Id.* at 65. (the State of Mississippi, by the decision of its public service commission, "has articulated clearly its intent to displace price competition among common carriers with a regulatory structure.") Importantly, the Court did not parse the wording of the Mississippi PSC's decision, rendered years before, but rather, understood the anticompetitive conduct at issue in the context of the State's overall regulatory policy to substitute economic regulation for unbridled competition.

As in the case of the constitutional limitations on State commission actions, the Court's reasoning in *Southern Motor Carriers* provides ample evidence that in the context of Federal antitrust litigation, the States should not be tightly held to specific "tests" which restrict the regulatory flexibility of their commissions. And the reason why it is important to ensure this result is clear:

> If more detail than a clear intent to displace competition were required of the legislature, States would find it difficult to implement through regulatory agencies their anticompetitive policies. Agencies are created because they are able to deal with problems unforeseeable to, or outside the competence of, the legislature. Requiring express authorization for every action that an agency might find necessary to effectuate a state policy would diminish, if not destroy, its usefulness.
>
> 471 U.S. at 64

Stated differently, if the *Midcal* formulation's "affirmative expression" standard is construed to require precise compliance by State regulatory commissions with rules made after the fact on a case-by-case basis by the Federal judiciary, agency regulation of utilities and carriers will be difficult, if not impossible.

II. The Court of Appeals' decision exceeds the role of Federal antitrust courts in reviewing State regulatory policies

In contrast to the flexibility this Court has traditionally provided State utility commissions, the Court of Appeals decision afforded little deference to the OPUC's 1972 decision, the OPUC's 1992 reaffirmation of its 1972 decision, and related commission and State court rulings. Rather, the court below found that the OPUC "did not approve the displacement of competition...with the clarity required by

Midcal." A-14. In so doing, the Court found a crucial distinction between the OPUC's decision to approve the utilities' agreement to allocate customers and facilities to specific geographic markets and the OPUC's failure to specifically declare that that allocation involved the establishment of exclusive service territories. *Id*.

We respectfully submit that the Court of Appeals' view of the OPUC decisionmaking process is empty formalism that is inconsistent with this Court's prior application of the State action doctrine to utility regulation. As the petition for certiorari explains, it was the understanding of the parties to the 1972 agreement and the OPUC itself that the State commission's decision approving the agreement was intended by the State to allocate customers so as to eliminate competition between PGE and PP&L. Pet. at 4-7. For the next twenty years, the OPUC regulated the two companies on the basis of this territorial allocation, and in 1992, issued decisions reaffirming its intention and understanding that its original approval of the utilities' agreement allocated retail service in Portland between the two companies. *Id*

The Petition describes how the Court of Appeals analysis of the "clear articulation" prong of the *Midcal* decision is inconsistent with decisions of this court and other Federal circuits. We agree with that analysis. However, from the perspective of the State commissions that must manage

their regulatory policies and procedures as effectively as possible, the NARUC approaches this issue from a practical perspective: on a day-to-day basis, how can State commissions manage their case load, discharge their statutory responsibilities, and protect the public interest from the abuse of market power in retail markets that are not yet fully competitive without not running afoul of Federal antitrust policies.

As this case illustrates, it is plainly disruptive of State regulatory processes for a commission's decisions to be strictly scrutinized by Federal courts decades after the commission acted under legal standards not fully formed when the State commission acted. Here, the OPUC's 1972 decision – affirmed by the Oregon judiciary -- to rationalize utility service territories in a manner consistent with typical regulatory practice at the time has been swept aside on the grounds that it lacks the clarity and precision found by a Federal court in 1996. Indeed, by its rejection of the OPUC's 1992 Order (App. M), the Court of Appeals determined that the OPUC's understanding of its own order was without effect.

We urge the Court to take this case to again define the appropriate role for Federal antitrust courts concerning State utility regulatory proceedings. Just as the Court found that it would be undesirable "to embroil the federal courts in the unnecessary interpretation of state statues" in *Town of Hallie*

v. City of Eau Claire, 471 U.S. 34, 44, n.7 (1985), it should determine here (as it did concerning the State of Mississippi's policy on motor carrier ratemaking) that Federal courts should not be embroiled in the details of State regulatory processes as well.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

CHARLES D. GRAY
General Counsel

JAMES BRADFORD RAMSAY*
Assistant General Counsel
& COUNSEL OF RECORD

National Association of Regulatory
Utility Commissioners

Suite 603, Old Post Office Pavilion
Post Office Box 684
Washington, D.C. 20044
(202) 898-2200

April 29, 1998